No. 97-9217-CFH Title: Manuel DeJesus Peguero, Petitioner
v.
United States

Docketed:
May 28, 1998 Court: United States Court of Appeals for the Third Circuit

Entry	Date	Proceedings and Orders
	May 26 1998	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 2, 1998)
	Jun 9 1998	Waiver of right of respondent United States to respond filed.
	Jun 18 1998	DISTRIBUTED. September 28, 1998
	Jul 2 1998	Response requested.
	Jul 31 1998	Order extending time to file response to petition until September 2, 1998.
	Sep 2 1998	Brief of respondent United States in opposition filed.
	Sep 29 1998	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 10, 1998. The brief of respondent is to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Tuesday, December 8, 1998. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 29, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 11, 1999. **********
	Nov 2 1998	Joint appendix filed.
	Nov 6 1998	Brief of petitioner Manuel DeJesus Peguero filed.
	Nov 10 1998	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Nov 23 1998	CIRCULATED.
	Dec 7 1998	Brief of respondent United States filed.
	Dec 21 1998	Record filed.
	Dec 28 1998	Record filed.
	Dec 29 1998	Reply brief of petitioner Manuel D. Peguero filed.
	Jan 11 1999	ARGUED.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MANUEL DEJESUS PEGUERO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL I. SIEGEL, ESQUIRE
ASST. FEDERAL PUBLIC DEFENDER
100 CHESTNUT STREET, SUITE 306
HARRISBURG, PA 17101
(717) 782-2237
ATTORNEY ID # 38910

Counsel for Petitioner,
Manuel DeJesus Peguero

97-9217
Peguero

QUESTION PRESENTED

SHOULD CERTIORARI BE GRANTED TO RESOLVE A SPLIT AMONG THE CIRCUITS REGARDING THE LEGAL STANDARD TO BE APPLIED WHEN A PRISONER SEEKS POST-CONVICTION RELIEF UNDER 28 U.S.C. §2255 ON THE GROUND THAT THE SENTENCING JUDGE DID NOT INFORM HIM OF HIS APPELLATE RIGHTS?

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ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997 97-9217

MANUEL DEJESUS PEGUERO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENTS

**MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS**

Pursuant to Rule 39 of the Rules of the Supreme Court of the United States, petitioner Manuel DeJesus Peguero asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit without prepayment of costs and to proceed in forma pauperis pursuant to an appointment under the Criminal Justice Act, 18 U.S.C. §3006A(d)(6). Pursuant to the Criminal Justice Act, the Federal Public Defender's Office was appointed to represent the petitioner in the United States

District Court for the Middle District of Pennsylvania and in the United States Court of Appeals for the Third Circuit. Leave to proceed in forma pauperis has not been sought in any other court.

DATED: May 22, 1998

Respectfully submitted,

Date: May 22, 1998

DANIEL I. SIEGEL, ESQUIRE
Asst. Federal Public Defender
100 Chestnut Street, Suite 306
Harrisburg, PA 17101
(717) 782-2237
Attorney ID # 38910

Counsel for Petitioner,
Manuel DeJesus Peguero

ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MANUEL DEJESUS PEGUERO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENTS

CERTIFICATE OF SERVICE

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I, Daniel I. Siegel, a member of the Bar of this Court, hereby certify that on this 22nd day of May, 1998, copies of the Motion for Leave to Proceed in Forma Pauperis and

the Petition for a Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the following:

Seth Waxman, Esquire
Acting Solicitor General
United States Department of Justice
950 Pennsylvania Avenue
Washington, DC 20530
(202) 514-2201

Mr. P. Douglas Sisk, Clerk
United States Court of Appeals
for the Third Circuit
21400 United States Courthouse
601 Market Street
Philadelphia, PA 19106-1790
(215) 597-2995

Kim D. Daniel, Esquire
United States Attorney's Office
Federal Building, Room 217
228 Walnut Street
Harrisburg, PA 17108
(717) 221-4482

Mr. Manuel DeJesus Peguero
Federal No. 06524-067
F.C.I. Schuylkill
P.O. Box 759
Minersville, PA 17954

I further certify that I am a member of the Bar of this Court and that all parties required to be served have been served.

DATED: May 22, 1998

Respectfully submitted,

Date: May 22 10:48

DANIEL I. SIEGEL, ESQUIRE
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Counsel for Petitioner,
Manuel DeJesus Peguero

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MANUEL DEJESUS PEGUERO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AND NOW comes the petitioner, Manuel DeJesus Peguero, by his attorney Daniel I. Siegel of the Federal Public Defender's Office, and respectfully petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for Third Circuit is reprinted in the appendix at page 1a. The unreported opinion of the United States District Court for the Middle District of Pennsylvania, Caldwell, J., is reprinted in the appendix at page 7a.

JURISDICTION

The United States Court of Appeals for the Third Circuit entered its memorandum opinion and judgment order on February 27, 1998 (1a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RULE INVOLVED

On April 22, 1992, the date of Mr. Peguero's sentencing hearing, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided as follows:

> **(2) Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Effective December 1, 1994, the rule regarding notification of appellate rights was transferred to Rule 32(c)(5) of the Federal Rules of Criminal Procedure. As reflected in the Advisory Committee Notes to the 1994 Amendments, "[a]lthough the provision has been rewritten, the Committee intends no substantive change in practice." The current Criminal Rule 32(c)(5) reads as follows:

> **(5) Notification of Right to Appeal.** After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

STATEMENT OF THE FACTS

1. Overview

When Manuel Peguero was sentenced in 1992 for his participation in a drug conspiracy, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided that at the time of sentencing, "the court shall advise the defendant of any right to appeal the sentence." The rule regarding advice of appellate rights now appears at Rule 32(c)(5) of the Federal Rules of Criminal Procedure. The district court imposed a sentence of 274 months imprisonment, but did not inform Mr. Peguero of his right to file an appeal. Appointed counsel did not file a notice of appeal, and no direct appeal was pursued.

Four and a half years later, Mr. Peguero filed a motion for post-conviction relief under 28 U.S.C. §2255. Citing the district court's failure to warn him of his appellate rights, Mr. Peguero sought an opportunity to pursue a direct appeal. He requested that the judgment of sentence be vacated, and that the case be scheduled for a new sentencing hearing. Relief was denied in the district court (7a, 28a), and the district court's order was affirmed by the United States Court of Appeals for the Third Circuit (1a).

There is a split among the circuits regarding the standard to be applied when a prisoner asserts, in a post-conviction motion, that the sentencing court did not inform him of his appellate rights. Seven circuits hold that failure to warn of appellate rights constitutes error per se, requiring the reviewing court to vacate the sentence and remand for resentencing; two circuits require that the prisoner show some type of harm stemming

from the sentencing court's failure to notify him of his right to appeal. See Thompson v. United States, 111 F.3d 109 (11th Cir. 1997) (collecting cases). Petitioner seeks relief under the majority rule, and asserts that the petition for writ of certiorari should be granted so that this Court may resolve the split among the circuits.

2. The guilty plea and the sentence

On January 6, 1992, defendant Manuel DeJesus Peguero appeared before the United States District Court for the Middle District of Pennsylvania, Caldwell, J., at which time he pled guilty to participating in a drug conspiracy in violation of 21 U.S.C. §846. On April 22, 1992, Mr. Peguero appeared before Judge Caldwell for sentencing, at which time he received a sentence of 274 months imprisonment.

In April of 1992, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided that at the time of sentencing, "the court shall advise the defendant of any right to appeal the sentence." The district court did not advise Mr. Peguero of his right to appeal the sentence, and defense counsel did not file a notice of appeal.

3. The post-conviction motion

On December 10, 1996, four and a half years after his sentencing hearing, Mr. Peguero filed a pro se motion for relief under 28 U.S.C. §2255. Mr. Peguero alleged, inter alia, that prior counsel had been ineffective in failing to file a direct appeal, despite defendant's explicit instructions to do so.

On April 23, 1997, the Federal Public Defender for the Middle District of Pennsylvania was appointed to represent Mr. Peguero. Counsel secured a transcript of the sentencing hearing, and discovered that the district court had not warned Mr. Peguero of his appellate rights as required under Criminal Rule 32(a)(2). On June 4, 1997, the defendant filed an amended petition citing the failure to notify the defendant of his appellate rights, and requesting that the defendant be resentenced so that he could thereafter file a timely notice of appeal.

4. **The evidentiary hearing**

An evidentiary hearing on defendant's motion for post-conviction relief was conducted on June 10, 1997. At that hearing, the district court heard testimony from defendant's trial counsel, Rex Bickley, Esquire, and from the defendant, Manuel Peguero.

Mr. Bickley testified that on the day of the sentencing hearing, after the conclusion of the sentencing hearing, he notified Mr. Peguero of his right to file an appeal. According to Mr. Bickley, the defendant indicated that he did not want to take an appeal, but instead wanted to secure a downward departure by cooperating with the government.

Mr. Peguero disputed the testimony offered by his prior attorney. The defendant testified that at "the moment of the sentence" he told his attorney to file an appeal.

5. **The district court's memorandum and order**

On July 1, 1997, the district court filed an unreported memorandum and order denying the motion for relief under 28 U.S.C. §2255 (7a). The district court credited Attorney Bickley's testimony, and found that the defendant had knowingly waived his appellate rights (20a - 22a). The district court concluded that because the defendant was not actually unaware of his appellate rights, the violation of Criminal Rule 32(a)(2) was not cognizable in a motion for relief under 28 U.S.C. §2255 (25a).

Pursuant to 28 U.S.C. §2253, a certificate of appealability was granted as to the single issue presented herein. Notice of appeal was filed July 30, 1997.

6. **Affirmance in the Court of Appeals**

On February 27, 1998, the United States Court of Appeals for the Third Circuit issued an unreported memorandum opinion and judgment order affirming the order of the district court (1a).

REASONS FOR GRANTING THE PETITION

Pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States, review on a writ of certiorari may be appropriate where there is a conflict among the courts of appeals on a matter of importance. In this case, there is a conflict among the federal circuits regarding the standard to be applied when a prisoner seeks post-conviction relief under 28 U.S.C. §2255 on the ground that the sentencing court did not inform him of his appellate rights as required by the former Rule 32(a)(2), the current Rule 32(c)(5), of the Federal Rules of Criminal Procedure.

The conflicting decisions in this area were recently discussed by the Eleventh Circuit in Thompson v. United States, 111 F.3d 109 (11th Cir. 1997) (granting post-conviction relief under 28 U.S.C. §2255). As stated by the Eleventh Circuit:

> The circuit courts are divided on the question of what standard is used to review a sentencing court's failure to advise a defendant of his right to appeal. Six circuits have held that such a failure constitutes error per se, requiring the reviewing court to vacate the sentence and remand for resentencing. United States v. Sanchez, 88 F.3d 1243, 1249 (D.C.Cir.1996); Reid v. United States, 69 F.3d 688, 690 (2d Cir.1995); United States v. Butler, 938 F.2d 702, 703-04 (6th Cir.1991); Paige v. United States, 443 F.2d 781, 782 (4th Cir.1971); United States v. Deans, 436 F.2d 596, 598-99 (3d Cir.1971); United States v. Benthien, 434 F.2d 1031, 1032-33 (1st Cir.1970). Two other circuits have held that a petitioner must show some type of harm stemming from the sentencing court's failure to notify him of his right to appeal. Tress v. United States, 87 F.3d 188, 189 (7th Cir.1996); United States v. Drummond, 903 F.2d 1171, 1174 (8th Cir.1990), cert. denied, 498 U.S. 1049, 111 S.Ct. 759, 112 L.Ed.2d 779 (1991); see also Biro v. United States, 24 F.3d 1140, 1142 (9th Cir.1994).

Id. at 110-11. In Thompson, the Eleventh Circuit adopted the majority rule, reasoning that "the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2)." Id. at 111 (cite omitted).

Petitioner is aware that as a general rule, violations of the Rules of Criminal Procedure are not cognizable in post-conviction proceedings absent prejudice to the defendant. United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085 (1979). There is an exception to that general rule, however, where failure to apply the rule of criminal procedure constitutes "an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962), United States v. Timmreck, supra, 441 U.S. at 784, 99 S.Ct. at 2087. If certiorari is granted, petitioner will argue that a district court's failure to inform the defendant of his appellate rights constitutes an omission inconsistent with the rudimentary demands of fair procedure, thus justifying post-conviction relief as a matter of law. Petitioner will request that the judgment of sentence be vacated, and that the case be remanded for resentencing, after which Mr. Peguero will have the opportunity to file a timely notice of appeal.

CONCLUSION

WHEREFORE, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted,

Date: May 22, 1998

DANIEL I. SIEGEL, ESQUIRE
Asst. Federal Public Defender
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Attorney ID # 38910

Counsel for Petitioner,
Manuel DeJesus Peguero

CERTIFICATE OF BAR MEMBERSHIP

I, DANIEL I. SIEGEL, of the Federal Public Defender's Office, hereby certify that I am a member of the Bar of this Court.

Respectfully submitted,

DANIEL I. SIEGEL, ESQUIRE
Assistant Federal Public Defender

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7384

UNITED STATES OF AMERICA,
Appellee

v.

MANUEL DEJESUS PEGUERO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
D.C. Crim. No. 90-cr-00097-1
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 1998

Before: Greenberg, Nygaard and McKee, Circuit Judges

(Filed February 17, 1998)

MEMORANDUM OPINION

McKee, Circuit Judge.

In this appeal, we are asked to review the district court's denial of Manuel DeJesus Peguero's petition for post-conviction relief, pursuant to 28 U.S.C. § 2255.

Peguero alleges that the district court erred as a matter of law in denying his petition for relief since the court had previously failed to advise Peguero of his appellate rights as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure. For the reasons explained below, Peguero's argument is meritless and we will affirm the order of the district court.

I.

In 1992, Peguero pled guilty in the United States District Court for the Middle District of Pennsylvania to conspiracy to distribute and possessing with intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. § 846. The court sentenced Peguero to 274 months imprisonment. The court did not advise Peguero of his appellate rights and Peguero did not file a notice of appeal.

In 1996, Peguero filed a pro se petition for post-conviction relief under 28 U.S.C. § 2255. After a public defender was appointed, Peguero filed an amended petition for relief. This petition requested that Peguero's sentence be vacated and the case listed for resentencing since the court had failed to notify Peguero of his right to appeal his conviction. Such acts would result in the reinstatement of Peguero's appellate rights.

In 1997, an evidentiary hearing was held where Peguero's former counsel, Rex Bickley, testified that on the day of the sentencing hearing he informed Peguero of his right to appeal. D.Ct.Op. at 10. Peguero, however, indicated that he did not wish to appeal. Rather, he wanted to cooperate with the government with the hope of securing a downward departure on his sentence for substantial assistance. Peguero himself testified

that, "[at] the moment of the sentence," he told Bickley to file an appeal. App. at 128.

The court filed a memorandum and order denying the petition for relief, finding that Peguero was sufficiently aware of his right to appeal and had knowingly waived that right. Relying on United States v. Timmreck, 441 U.S. 780 (1979), the court found that Peguero was not "actually unaware" of his right to appeal. Consequently, the court deemed its violation of Rule 32(a)(2) insufficient "to vacate a sentence under § 2255." D.Ct. Op. at 19.

Peguero now appeals.

II.

We have jurisdiction of final orders pursuant to 28 U.S.C. § 1291. When we review a district court's decision granting or denying a petition for post-conviction relief our standard is de novo. United States v. Cleary, 46 F.3d 307, 310 (3d Cir. 1995).

III.

Peguero argues that the district court's failure to advise him of his appellate rights is a per se violation, necessitating post-conviction relief. The government responds that the court's failure to notify was a "technical violation" and must be subject to a harmless error analysis.

"[A] sentencing court's failure to inform a defendant of the right to appeal following a jury conviction is 'harmless error' if the government can show by clear and convincing evidence that the defendant knew of the right to appeal. (citation omitted). We see no reason for not applying the same analysis in the guilty plea context, where

appeal rights are more limited." McCumber v. United States, 30 F.3d 78, 79 (8th Cir. 1994).

The court based its decision to deny Peguero's petition for post-conviction relief on several factors: 1) Peguero was aware of his appellate rights given his guilty plea and desire to cooperate with the government in exchange for a downward departure on his sentence; 2) Peguero waited over four years to file his claim for post-conviction relief; and 3) The court knew and respected Peguero's counsel, who testified that Peguero was aware of his right to appeal. See D.Ct.Op. at 15-16.

Without even crediting Peguero's former counsel's testimony, it is clear that Peguero knew of his right to appeal. The purpose behind Rule 32(a)(2) is to insure that a defendant is aware of this right. Consequently, the district court's error did not result in a miscarriage of justice.

IV.

The foregoing demonstrates that the court's failure was harmless and thus does not justify collateral attack by Peguero.

Affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7384

UNITED STATES OF AMERICA,
Appellee

v.

MANUEL DEJESUS PEGUERO,
Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
D.C. Crim. No. 90-cr-00097-1
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 1998

Before: Greenberg, Nygaard and McKee, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on February 12, 1998.

On consideration whereof, it is hereby ordered and adjudged by this court that the

order denying post-conviction relief entered on July 1, 1997 be and the same is affirmed.

ATTEST:
Acting Clerk

FEB 27 1998

Dan

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, :
Plaintiff :
:
vs. :CRIMINAL ACTION NO. 1:CR-90-97-01
CIVIL ACTION NO. 1:CV-96-2143
:
MANUEL D. PEGUERO, :
Defendant :

M E M O R A N D U M

I. Introduction.

The defendant, Manuel Peguero, filed a pro se motion under 28 U.S.C. § 2255, seeking to vacate the 274-month sentence imposed on him after his plea of guilty to count I of the indictment charging him under 21 U.S.C. § 846 with conspiring to distribute and possessing with intent to distribute, more than five kilograms of cocaine. After review of the motion, we appointed the Federal Public Defender to represent him. The public defender filed an "amended" 2255 motion and an "evidentiary hearing memorandum" which raise additional grounds for relief.

The pro se motion makes the following arguments, all based on trial counsel's ineffectiveness: (1) counsel told the defendant that he would receive a maximum of ten years in prison if he pled guilty, less than half of the almost 22-and-one-half-year sentence he did receive; (2) counsel failed to explain the nature of the plea agreement; (3) counsel improperly stipulated

that defendant was a manager or supervisor of the conspiracy, leading to an enhanced sentence; (4) counsel did not take a direct appeal although defendant instructed him to do so; and (5) counsel failed to insure that defendant's sentence was comparable to his coconspirators.

The amended motion adds the following ground: the court did not advise the defendant pursuant to Fed. R. Crim. P. 32(a)(2) at his guilty-plea or sentencing hearings of his right to appeal. The "evidentiary hearing memorandum" adds two grounds. First, the plea should be vacated because the court violated Fed. R. Crim. P. 11(c) by not advising the defendant at the time of his plea of: (1) the mandatory minimum penalty; (2) the maximum possible penalty; (3) the effect of any supervised release term; (4) the right to assistance of counsel at trial; (5) the right to confront and cross-examine witnesses at trial; (6) the right against compelled self-incrimination at trial; and (7) that any statements made under oath could be used against the defendant in a later prosecution for perjury or false statements. Second, the sentence should be vacated because the court did not ask the defendant if his plea was the result of any threats or promises outside the plea agreement. The defendant maintains that the latter failure was especially prejudicial because it would have revealed the defendant's erroneous understanding that he was only going to receive a 10-year term.

On June 10, 1997, we held a hearing on the motion. Based on that hearing and the transcripts of prior proceedings, we provide the following background.

II. Background.

On April 3, 1990, the defendant was charged in an indictment with the following offenses: (1) in count I, conspiracy to distribute and possess with intent to distribute cocaine from March 1989 through January 19, 1990, in violation of 21 U.S.C. §§ 841(a)(1) and 846; (2) in count II, distribution and possession with intent to distribute cocaine on September 27, 1989, in violation of 21 U.S.C. § 841(a)(1); (3) in count III, distribution and possession with intent to distribute six ounces of cocaine on January 13, 1990, within 1,000 feet of a school in violation of 21 U.S.C. § 845a(1); and (4) in count IV, conspiracy with a minor for the purpose of distributing cocaine from December 20, 1989, through January 13, 1990, in violation of 21 U.S.C. § 845b.

In January 1992, the defendant executed a plea agreement, dated January 2, 1992. In paragraph one he agreed to plead guilty to count I of the indictment. Paragraph one also advised the defendant that the "maximum penalty for the offense is imprisonment for a period no less than 10 years and a maximum of life imprisonment and/or a fine of $4,000,000, a term of supervised release to be determined by the court, the costs of

prosecution as well as an assessment in the amount of $50." (Plea agreement, ¶ 1). Finally, this paragraph stipulated that "the defendant's personal involvement in this conspiracy . . . was no less than 15 kilos and no more than 50 kilos of cocaine."

The agreement also informed the defendant that the court was not a party to the agreement and was not bound by any recommendation that he or the government might make concerning the sentence to be imposed. (Id., ¶ 14). "Thus, the Court [was] free to impose upon the defendant any sentence up to and including the maximum sentence of imprisonment for life . . . . " (Id.) (brackets added). The government was allowed to recommend a sentence that it "consider[ed] appropriate based upon the nature and circumstances of the case and the defendant's participation in the offense. . . " (Id., ¶ 9)(brackets added). The government specifically reserve[d] the right to recommend a sentence up to and including the maximum sentence . . . ." (Id.)(brackets added). Finally, the agreement provided that the defendant could not withdraw his guilty plea if he was dissatisfied with the court's sentence or if it declined to follow any of the parties' recommendations as to sentencing, (id. at ¶ 15), and it contained a merger clause, specifying that there were no other written or oral agreements and that "[n]o other promises or inducements" had been made to the defendant. (Id., ¶ 29) (brackets added).

The defendant signed the agreement under a paragraph stating: "I have read this agreement and carefully reviewed every

part of it with my attorney. I fully understand it and I voluntarily agree to it." His attorney also signed it under a paragraph stating: "I am the defendant's counsel. I have carefully reviewed every part of this agreement with the defendant. To my knowledge my client's decision to enter into this agreement is an informed and voluntary one."

The defendant is an Hispanic born in the Dominican Republic. He has some knowledge of English, but a Spanish interpreter was present at all court proceedings.

On January 6, 1992, a guilty-plea hearing was held. The prosecutor opened the hearing by noting the essentials of the agreement--that the defendant would plead guilty to count I and that his quantity of cocaine would be set at not less than 15 nor more than 50 kilograms of cocaine. (doc. 60 at p. 6). Defense counsel then noted the provision that the government would move for a downward departure if the defendant provided assistance (Id.).

Later in the hearing, the court questioned the defendant about the knowing and voluntary nature of the plea. The defendant indicated that he had consulted with his attorney about the change of plea, that counsel had fully informed him of his rights "as far as [the defendant] kn[e]w," that he understood that he did not have to plead guilty, that he could be tried by a jury, that by pleading guilty he gave up the presumption of innocence and relieved the government of the necessity to present evidence, and

that his guilt was established by his admission of guilt to the court. (Id. at pps. 7-8)(brackets added).

The court then turned to the sentencing issue. The defendant stated that defense counsel had explained the sentencing guidelines to him, and that he understood the sentence was controlled to some extent by the quantity of cocaine attributed to him, and that the government had calculated his potential sentence was in the "range of 20 years and upwards." (Id. at pps. 9-10). The defendant also said that he was satisfied with counsel's representation, (id. at p. 8), and that he "just want[ed] to plead guilty and get on with the sentencing." (Id. at p. 12)(brackets added).

On April 22, 1992, a sentencing hearing was held. Defendant objected to the four-level enhancement the government sought under U.S.S.G. § 3B1.1(a) for being an organizer or leader of the conspiracy. The defendant testified, seeking to minimize his role in the offense. The prosecutor cross-examined him and proffered transcripts of the testimony of his coconspirators in related criminal proceedings concerning his position in the conspiracy. Eventually, the government and defense counsel stipulated that the defendant would be subject to a three-level enhancement under § 3B1.1(b) as a manager or supervisor. (Doc. 50, sentencing transcript at p. 19).

Defense counsel then argued on his client's behalf as to an appropriate sentence. He acknowledged the defendant's involvement in the sale of narcotics, but then said:

> Almost from the very outset, however, Your Honor, Mr. Peguero came to me and indicated a willingness to cooperate and a willingness to enter a plea of guilty. Now at that time he was somewhat uncertain as to the nature of his sentence, but, in any event, he did indicate he wanted to plead guilty, he wanted to cooperate and get this behind him . . . .

(Id. at pps. 20-21).

At the time of sentencing, the defendant had four prior convictions in New Jersey, all for drug offenses.

The defendant was subject to U.S.S.G. § 5G1.3, allowing the court to impose concurrent or consecutive sentences or partially concurrent or consecutive sentences, for having committed his federal offense while he was on bail from his two 1988 New Jersey drug offenses. He was also subject to an enhancement under § 2J1.7 of the guidelines for commission of an offense while on release. Additionally, he was classified in criminal history category VI as a career offender because he had at least two prior convictions for drug offenses as an adult. The defendant's guideline range was 292 months to 365 months. The court took sections 5G1.3 and 2J1.7 into account by going below the minimum guideline to 274 months imprisonment, not as much of a reduction if only § 5G1.3 had been considered alone, but determined to be appropriate when the enhancement under § 2J1.7

was considered. He was also given five years of supervised release. This sentence was ordered to be served consecutively to the New Jersey sentence of 10 years of which the defendant was required to serve four years.

The defendant took no direct appeal of his conviction or sentence. He later sought some judicial relief. In January 1995, he filed a motion for free transcripts, alleging that he needed the transcripts because his memory of the guilty-plea and sentencing hearings was not good and he wanted to raise three specific grounds for relief from his conviction: (1) the career offender guideline should not have been used to set his sentence; (2) he should have received credit on his sentence from the date of his indictment rather than the date of sentencing; and (3) trial counsel was ineffective for not raising the first two grounds. By order, dated February 24, 1995, we denied the motion, in part, because he had no 2255 motion pending at the time and because the grounds he wished to raise would not have appeared in the record in any event.

On March 16, 1995, the defendant filed a "motion for clarification of sentence," an apparent attempt to lay the groundwork for an attack on his sentence by finding out the factors that had been considered at sentencing.

There were also some extrajudicial attempts at relief. In August 1993, his mother wrote the court asking for a reduction in his sentence. In that letter, his mother also said: "My son's

Lawyer told told (sic) him that if he declared himself guilty he would get a sentence of seven years, but it was not truth because he received a sentence of 23 years." At the bottom of this letter, the defendant's wife also asked for assistance but did not mention the purported sentencing deal. (On August 18, 1993, the Probation Office responded to that letter by noting that the court was unable to change the sentence imposed.) In July 1995, his mother wrote again asking that he be deported because she had cancer and she wanted to be with him in the time she had left.

The current 2255 proceeding, initiated on December 10, 1996, coming some four-and-one-half years after his sentence, is the defendant's first attempt at postconviction relief, and the first time he ever personally brought to the court's attention his claim that his lawyer had promised him a 10-year sentence.

At the hearing held to resolve the factual issues raised, his trial counsel testified. Counsel had received discovery material from the government in December 1991 concerning the merits of the case against Peguero, consisting of 39 pieces of evidence including witness statements and evidence from the trial of a coconspirator, Miguel "Pepe" Feliciano-Rosario. (Doc. 78 at pps. 19-21). Counsel advised the defendant that a significant case could be brought against him. (Id. at 21-22). Counsel also stated that he always had an interpreter with him when he met with Peguero, at least after their initial meeting. (Id. at 25).

As to review of the plea agreement, counsel said that he went over it in detail with the defendant, including such provisions as the defendant's cocaine quantity as well as his maximum sentence. (Id. at 23-25). He believes he told the defendant, based on notes in his file, that he was looking at 210 to 324 months in prison. (Id. at 26). He also believes that he told the defendant about the career-offender provision but does not recall specifically doing so. (Id. at 11).

Counsel also testified about a portion of a letter he had written to the prosecutor, attached as an exhibit to the government's response to the 2255 motion. Counsel wrote that the defendant "may not have fully comprehended the situation." Counsel said that he meant by this statement that defendants often do not understand the length of federal sentences as opposed to state sentences. (Id. at 14).

As to taking an appeal, counsel testified that he told Peguero he had a right to an appeal and that he would represent him. (Id. at 12-13, 31). However, the defendant did not want to take an appeal, preferring instead to cooperate with the government in an attempt to reduce his sentence. (Id. at 13, 31). The defendant never wrote him after that asking for an appeal; he just wrote letters with information that might be helpful to the government. (Id. at 32-33). The first time counsel heard about the defendant's contention that he had wanted an appeal was

earlier in 1997 when the prosecutor contacted him after the 2255 motion had been filed. (Id. at 33).

As to counsel's alleged statement that the defendant would receive only 10 years, counsel denied making it. (Id. at 26). Instead, he told the defendant he would receive a "significant sentence" and that he was unsure of the exact length. (Id.).

Peguero also testified. As to review of the plea agreement, Peguero acknowledged meeting with counsel personally and that an interpreter was present but that they only met about the agreement for about five to 10 minutes. (Id. at 43). He testified that the agreement was never read to him, explained to him, or summarized for him. (Id. at 43). Peguero acknowledged that the signature on the agreement was his, but denied filling in the date. (Id. at 49-50). He signed it because counsel advised him he would only get 10 years. (Id. at 54).

Peguero met with his attorney before the guilty-plea hearing and had a fast conversation. Counsel told him through the interpreter that he would get 10 years. (Id. at 45). In fact, "from the first time they met," counsel had told him he would get 10 years. (Id. at 41). Later, when he received 274 months at the sentencing, he felt a "shock in [his] heart." (Id. at 46) (brackets added). He was "left dumb." (Id. at 61). His attorney left after the sentencing hearing, and he did not see him. (Id. at 46).

The defendant understood most of the guilty-plea hearing. (Id. at 56). He was not sick at the time or on medication. (Id.). At the 2255 hearing, the prosecutor confronted him with his affirmative responses to the court's questions at the guilty-plea hearing about consulting with his attorney about the change of plea, being fully informed by his counsel of his rights, and being satisfied with counsel's representation. Peguero responded that he answered the first and third questions that way because his lawyer had told him he would get 10 years. (Id. at 57). As to his reaction to the government's calculation of his sentence as greater than 20 years, he said that he did not pay attention, that he believed in his attorney. (Id. at 59). He also said that he was confused and disoriented at the time, (id. at 56), and that "sometimes you hear some things and you cannot comprehend them." (Id. at 59). The defendant would have mentioned the promise of a 10-year sentence at the guilty-plea hearing, and he would not have pled guilty, if he had known the promise would not be enforced. (Id. at 48).

As to an appeal, at the moment of sentencing, Peguero said in English that he wanted to appeal. (Id. at 46). Shortly after the sentencing, while he was at Union County Prison, a fellow prisoner wrote a letter to his attorney, dated April 29, 1992: (1) expressing the defendant's confusion about the sentence he received and mentioning the 10-year sentence he was supposed to have gotten; (2) requesting that an appeal be taken; and (3)

offering to consider cooperating. Contrary to his statement at the 2255 hearing, the defendant also questioned why his counsel would not meet with him before the sentencing hearing. (Id. at 47; government's exhibit 1 at the 2255 hearing).

As an explanation as to why he had waited so long to seek judicial relief from his sentence, the defendant stated that "he thinks" he, his wife and his mother had all written letters to the court about the 10-year sentence he was supposed to have received. (Doc. 78 at p. 63). His mother's letter was four years ago. Additionally, his wife would call his trial counsel and complain. (Id. at 63). He also hinted as a possible explanation for the delay that he had no money for transcripts and the court had denied his motion for free transcripts. (Id. at 61).

III. Discussion.

A. The Stipulation Concerning the Defendant's Role as a Manager or Supervisor of the Conspiracy and the Disparity Between the Defendant's Sentence and his Coconspirators.

We will deal first with the claims that trial counsel improperly stipulated that defendant was a manager or supervisor of the conspiracy, which led to a three-level enhancement, and that counsel failed to insure that defendant's sentence was comparable to his coconspirators.

We agree with the government that the first of these claims must fail because the defendant has provided no factual

support for the claim that he was not an organizer or supervisor. We also note that the presentence report's description of the offense conduct supports the enhancement.

The second of these claims also fails because the plaintiff similarly provides no support for his claim that he is entitled to the same sentence as certain of his conspirators. A mere disparity in the sentences received by codefendants under the guidelines is not a reason for a downward departure. United States v. Higgins, 967 F.2d 841 (3d Cir. 1992)(citing United States v. Joyner, 924 F.2d 454 (2d Cir. 1991)). The government also points out that their roles in the offense were not as great as the defendant's.

B. The Failure to Take an Appeal.

A direct appeal in a federal criminal case is a matter of right. United States v. Peak, 992 F.2d 39, 41 (4th Cir. 1993). Thus, the sixth amendment right to counsel applies to such an appeal, see id., and defense counsel must appeal when requested even if there are no meritorious issues. Id. See also United States ex rel. O'Brien v. Maroney, 423 F.2d 865, 868 (3d Cir. 1970)(dicta).

The key here, however, is whether the defendant requested an appeal. Defense counsel need not appeal if his client tells him not to so. Trial counsel testified that he did not appeal because his client did not want an appeal. Counsel

stated that defendant preferred instead to concentrate on providing cooperation so that his sentence would be reduced.

Although defendant testified that he requested an appeal immediately after being sentenced and produced a copy of a letter he said he mailed to counsel a few days after sentencing, we accept counsel's version of events. First, it is the most consistent with prior proceedings. The reason counsel stated for not taking an appeal, cooperation in the hope of obtaining a reduced sentence, appears as early as the guilty-plea hearing when the first point counsel made at that hearing was the government's agreement to move for a reduced sentence in return for cooperation. Similarly, at the sentencing hearing, counsel tried to minimize the sentence the defendant would receive by pointing out that "[a]lmost from the very outset," the defendant indicated a willingness to cooperate, as well as plead guilty.

Second, we can take into account how long it has taken the defendant to finally present this claim to the court, having raised it for the first time in his 2255 motion some four and one-half years after sentencing. Even though the defendant argues that he told his lawyer at sentencing to take an appeal, the failure of counsel to do so was never mentioned in either of the motions the defendant filed after he was sentenced or in any letters to the court. The need for a transcript cannot excuse the late filing since the lack of a transcript did not prevent the

defendant from setting forth specific grounds for relief in his January 1995 motion for free transcripts.

Third, we note our experience with his trial counsel in previous matters. Counsel is an able lawyer, honest in his dealings with the court in the past, and there is no reason why he would not have taken an appeal if directed by defendant, or why he would deny having been asked to do so. Unfortunately for defendant, we can think of a very good reason why he would now want to be untruthful about his past desire for an appeal and fabricate evidence in support of his current claims.

We therefore reject the claim that counsel failed to take a requested appeal.

C. Counsel's Promise of a 10-Year Sentence and the Explanation of the Plea Agreement.

"A guilty plea induced by promises that divest the plea of its voluntary character is void." Zilich v. Reid, 36 F.3d 317, 321 (3d Cir. 1994)(citing Machibroda v. United States, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473, 478 (1962)). An unfulfilled promise of a particular term of imprisonment is such a promise. See Zilich, 36 F.3d at 321 (an unkept promise of probation in return for a guilty plea negates the voluntariness of the plea).

In the instant case, the defendant maintains that his lawyer told him he would receive only a 10-year sentence. Counsel has testified that no such promise was made. For the second and

third reasons advanced above in regard to the appeal issue, we resolve this factual dispute against the defendant.

The first time the defendant ever moved in court for relief from his sentence on the ground that he was supposed to receive a 10-year sentence was in his 2255 motion, filed some four and one-half years after his sentencing, even though at sentencing the time he received caused him to be "struck dumb" and to feel a "shock to [his] heart," and even though he raised other grounds for relief in his motion for free transcripts. It is true that his mother wrote a letter to the court in August 1993, but she had no personal knowledge of any conversations her son had with his counsel (and aside from that she said he had been promised seven years, not 10 years).

Additionally, we can conceive of no reason why his trial counsel would not affirm the existence of this purported promise. To begin with, it is odd that "from the first time they met" counsel would have told him he would only get 10 years. How counsel could make this prediction so early on, or why he would do so, is difficult to understand. Counsel is an experienced courtroom litigator, he has in fact tried cases before the court in the past, so it seems that he would have simply tried the case if he had to. Perhaps one reason he did not was the strength of the government's case conveyed to him by the prosecutor.

We turn now to the claim that counsel did not explain the plea agreement to the defendant. For the reasons set forth

above, we resolve this factual dispute against the defendant as well. We find that the plea agreement in all material respects was explained to the defendant, that the defendant understood it, and that he signed it knowing what it contained.

The plea agreement provides an additional reason for rejecting the claim that trial counsel told him he would only receive 10 years. The agreement contains no such provision and, to the contrary, advises the defendant he could receive life in prison, that the government could recommend a sentence up to life, and that the court could impose the sentence it believed was appropriate.

D. The Court's Rule 11 and Rule 32 Violations.

The defendant argues that the sentence should be vacated because of the following rule violations. First, we did not advise him pursuant to Fed. R. Crim. P. 32(a)(2) at his guilty-plea or sentencing hearings of his right to appeal. Second, we did not advise him under Fed. R. Crim. P. 11(c) at the time of his plea of: (1) the mandatory minimum penalty; (2) the maximum possible penalty; (3) the effect of any supervised release term; (4) the right to assistance of counsel at trial; (5) the right to confront and cross-examine witnesses at trial; (6) the right against compelled self-incrimination at trial; and (7) that any statements made under oath could be used against the defendant in a later prosecution for perjury or false statements. Third, we

did not ask him under Rule 11(d) if his plea was the result of any threats or promises outside the plea agreement.

A mere violation of Rule 11 or Rule 32 is not enough to vacate a sentence under section 2255. See United States v. Timmreck, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979)(Rule 11); United States v. Vancol, 778 F. Supp. 219 (D. Del. 1991)(Rule 32). Instead, in 2255 proceedings the defendant must show that the violation "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" Timmreck, 441 U.S. at 784, 99 S.Ct. at 2087, 60 L.Ed.2d at 638; Vancol, 778 F. Supp. at 223. A defendant could make this showing by establishing that he "was actually unaware" of the information the Rule intended to convey" or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." Timmreck, 441 U.S. at 784, 99 S.Ct. at 2087, 60 L.Ed.2d at 638.

In the instant case, we have already determined that the defendant knew about his right to appeal and decided not to exercise it. Thus, he cannot attack the Rule 32 violation in these proceedings.

We have also determined that he knew and understood the provisions of his plea agreement. The agreement advised him of his mandatory minimum penalty, the maximum possible penalty and that a term of supervised release would be imposed. He therefore cannot base his 2255 attack on the failure to give him this

information. As to the effect of any supervised release term, the defendant cannot now complain about it when the combined term of incarceration and supervised release is less than the sentence of life imprisonment of which he was advised in the plea agreement. See United States v. DeLuca, 889 F.2d 503 (3d Cir. 1989).

In regard to the other violations of Rule 11(c), we note first that we did advise the defendant, and he indicated that he understood, that he did not have to plead guilty, that he could be tried by a jury, that by pleading guilty he gave up the presumption of innocence and relieved the government of the necessity to present evidence. Even after being advised of these significant rights, the defendant nonetheless pled guilty, so we do not believe that if he had been advised of his other rights, he would not have done so. (In any event, the defendant undoubtedly knew that he had the right to be represented at trial by a lawyer by the fact that trial counsel had been appointed for him.) Moreover, and more importantly, the defendant never asserted at the hearing that he did not know of these rights (the defendant had four prior convictions, so he had previous experience with the criminal-justice system), or if he had been advised of them, he would not have pled guilty.

Finally, in regard to the Rule 11(d) violation, since the defendant had not been made any promise that did not appear in the plea agreement, the failure to ask him about any such promise was harmless.

E. Motion For Downward Departure Based on Postconviction Rehabilitation.

The defendant filed a memorandum in support of a request for a downward departure, based on the recent Third Circuit decision in United States v. Sally, No. 96-1864, 1997 WL 277972 (3d Cir. May 28, 1997). Sally allowed such a downward departure for postconviction rehabilitation efforts when the defendant had to be resentenced after he successfully vacated one of his convictions. Here, the defendant was not successful at vacating his sentence, and it does not appear that we otherwise have the authority to vacate his sentence to take into account postconviction rehabilitation efforts. We will therefore deny the request for a downward departure. However, the defendant may refile it if he can show that we have authority to consider it in the absence of his sentence being vacated.

We will issue an appropriate order.

William W. Caldwell
United States District Judge

Date: July 1, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, Plaintiff	:	
	:	
vs.	:	CRIMINAL ACTION NO. 1:CR-90-97-01 CIVIL ACTION NO. 1:CV-96-2143
	:	
MANUEL D. PEGUERO, Defendant	:	

ORDER

AND NOW, this 1st day of July, 1997, it is ordered that:

1. The defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, filed December 10, 1996, and his amended 2255 motion, filed June 4, 1997, are denied.

2. The defendant's request for a downward departure is denied without prejudice

3. The Clerk of Court shall close this file.

William W. Caldwell
United States District Judge

AO 72A
(Rev. 8/82)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

MANUEL D. PEGUERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a convicted defendant who was aware of his right to appeal his sentence and elected not to appeal may have his sentence set aside on a motion under 28 U.S.C. 2255 because the sentencing court failed to comply with the requirement of Federal Rule of Criminal Procedure 32 that the court advise the defendant of his appellate rights.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-9217

MANUEL D. PEGUERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is unreported, but the judgment is noted at 142 F.3d 430 (Table). The opinion and order of the district court denying petitioner's motion under 28 U.S.C. 2255 (Pet. App. 7a-28a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1998. Pet. App. 5a-6a. The petition for a writ of certiorari was filed on May 26, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to 274 months of imprisonment, to be followed by five years of supervised release. Pet. App. 13a-14a. Petitioner took no direct appeal. Pet. App. 14a. In December 1996, more than four years after judgment was imposed, petitioner filed a motion under 28 U.S.C. 2255 challenging his conviction and sentence. The district court denied the motion, Pet. App. 7a-27a, and the court of appeals affirmed. Pet. App. 1a-6a.

1. On April 3, 1990, a grand jury in the Middle District of Pennsylvania indicted petitioner for conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846 (Count One); possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count Two); possession, within 1,000 feet of a school, of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) and 845a (Count Three); and conspiracy with a minor to distribute cocaine, in violation of 21 U.S.C. 845b (Count Four). Pet. App. 9a. In a written plea agreement, petitioner agreed to plead guilty to Count One of the indictment, and the government agreed to move for a sentencing departure on his behalf if he provided substantial assistance to law enforcement. Pet. App. 9a-11a; C.A. App. 59-71; Presentence Report 1.

On April 22, 1992, petitioner appeared for sentencing. Although the sentencing range prescribed for petitioner under the

federal Sentencing Guidelines was 292 to 365 months of imprisonment, the district court imposed a sentence of 274 months.[1] C.A. App. 190-192; see also Pet. App. 13a-14a. The government did not move for a downward departure based on petitioner's cooperation because he had been untruthful in his debriefing interview. C.A. App. 188. In sentencing petitioner, the district court failed to notify him of his right to appeal his sentence. Pet. App. 2a. Petitioner did not file an appeal. Ibid.

2. On December 10, 1996, petitioner filed a pro se motion under 28 U.S.C. 2255 to set aside his conviction and sentence. Pet. App. 7a-8a; C.A. App. 17-29. After the district court appointed counsel to represent him, petitioner filed an amended motion alleging that the district court had violated Federal Rule of Criminal Procedure 32(a)(2) by failing to inform petitioner of his right to appeal his sentence.[2] Pet. App. 8a; C.A. App. 74-77.

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[1] In sentencing petitioner below the Guidelines range, the district court relied on Sentencing Guidelines § 5G1.3, which applies when the defendant is subject to an undischarged term of imprisonment for a different offense. In this case, petitioner was on bail pending resolution of New Jersey state narcotics charges when the federal offense was committed. Petitioner ultimately received a ten-year sentence for that offense. Although the district court could have made a portion of petitioner's federal sentence concurrent with his state sentence under Section 5G1.3, the court instead imposed a consecutive sentence and granted defendant a small departure below the minimum sentence specified by the Guidelines. Pet. App. 13a-14a.

[2] At that time, the rule provided, in relevant part:

> There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal his sentence.

(continued...)

The amended motion requested that petitioner's sentence be vacated and that the case be listed for resentencing, a procedure that would result in the reinstatement of petitioner's appellate rights. Pet. App. 2a; C.A. App. 76.

At an evidentiary hearing on the motion, petitioner's former counsel, Rex Bickley, testified that he had informed petitioner of his right to appeal on the day of the sentencing hearing and had offered to represent him. Petitioner declined to take an appeal, however, preferring instead to cooperate with the government in an attempt to reduce his sentence. Pet. App. 2a, 15a-17a; C.A. App. 94-95, 113. Bickley further testified that, in the year after petitioner's sentencing, he received five or six letters from petitioner stating that petitioner wanted to provide information to the government, and none of those letters expressed any desire to take an appeal. C.A. App. 114-115. Petitioner also testified at the hearing and asserted that he informed his counsel at the moment of sentencing that he wanted to appeal. In addition, petitioner testified that shortly after sentencing, a fellow prisoner wrote a letter to petitioner's attorney, requesting that an appeal be taken. Pet. App. 18a-19a; C.A. App. 128-129, 146-148.

In a memorandum opinion dated July 1, 1997, the district court denied petitioner's Section 2255 motion. Crediting the testimony of petitioner's counsel, the court found that petitioner did not want to appeal but chose instead to seek a sentence reduction in

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[2](...continued)
That provision now appears in revised form at Federal Rule of Criminal Procedure 32(c)(5).

exchange for his cooperation. Pet App. 20a-21a. Accordingly, the court rejected petitioner's claim under Federal Rule of Criminal Procedure 32. The court ruled that, because petitioner actually knew of his right to appeal and chose not to exercise it, he could not raise the claim in a Section 2255 motion. Pet. App. 25a (citing United States v. Timmreck, 441 U.S. 780, 784 (1979)). The district court granted petitioner a certificate of appealability, limited to the Rule 32 issue. C.A. App. 215.

The court of appeals affirmed. Pet. App. 1a-4a. Citing the Eighth Circuit's decision in McCumber v. United States, 30 F.3d 78, 79 (8th Cir. 1994), the court concluded that the failure to inform the defendant of his appellate rights is "harmless error" if the government can show by clear and convincing evidence that the defendant knew of his right to appeal. Pet. App. 3a. Because "it is clear that [petitioner] knew of his right to appeal" even without reliance on his former counsel's testimony, the court concluded that the sentencing court's failure to advise petitioner of that right was "harmless and thus does not justify collateral attack by [petitioner]." Pet. App. 4a.

ARGUMENT

Petitioner does not challenge the factual findings of the district court, affirmed by the court of appeals, that he knew of his appellate rights and elected to forgo an appeal. Rather, petitioner contends that, despite his actual knowledge of his rights, any violation of the notice requirement of Rule 32 requires that his sentence be vacated without inquiry into whether the

violation prejudiced him. There is no merit to petitioner's contention.

1. a. A claim that the district court violated a non-constitutional procedural rule is not cognizable in a motion under 28 U.S.C. 2255 absent a showing that the violation is "a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with the rudimentary demands of fair procedure." Hill v. United States, 368 U.S. 424, 428 (1962). In Hill, this Court held that violation of Rule 32's requirement that the sentencing court afford the defendant an opportunity to make a statement on his own behalf before sentencing is not cognizable in a Section 2255 motion. Id. at 428-429. The Court noted that the defendant was not affirmatively denied the right to speak and did not claim any prejudice from the violation -- there was no suggestion that the sentencing court was misinformed or uninformed as to any relevant circumstances because of the defendant's failure to speak, and "there [wa]s no claim that the defendant would have had anything at all to say if he had been formally invited to speak." Id. at 429.

In United States v. Timmreck, 441 U.S. 780 (1979), this Court reaffirmed the principle enunciated in Hill. The Court ruled that a conviction based on a guilty plea is not subject to collateral attack simply because Rule 11 of the Federal Rules of Criminal Procedure was violated when the plea was accepted. Id. at 783. In Timmreck, the district court failed to advise the defendant that his guilty plea would subject him to a five-year term of special

parole. This Court rejected as unreasonable any claim that the failure "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure'" because the defendant did "not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." Id. at 784.

Petitioner's claim here is analogous to the claims rejected by this Court in Hill and Timmreck. Like the defendants in those cases, petitioner alleges no more than a formal violation of a procedural rule that caused him no prejudice. Petitioner claims only that the sentencing court omitted to advise him of his right to appeal his sentence. Any contention that the omission resulted in a "miscarriage of justice" or was "inconsistent with the rudimentary demands of fair procedure" is untenable, because petitioner, who was represented by counsel, was aware of his right to appeal and chose not to appeal. Cf. Reed v. Farley, 512 U.S. 339 (1994).

b. Indeed, because petitioner suffered no prejudice from the procedural violation, he would be entitled to no relief under conventional principles of harmless error analysis. Federal Rule of Criminal Procedure 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." That Rule generally requires actual prejudice to the accused before reversal for procedural error is warranted. See Bank of Nova Scotia v. United States, 487 U.S. 250,

254-257 (1988); United States v. Mechanik, 475 U.S. 66, 71-72 (1986); United States v. Lane, 474 U.S. 438, 448-449 (1986); United States v. Hasting, 461 U.S. 499, 509 (1983). In Lane, the Court rejected the notion that procedural errors can be categorically predetermined as "harmless" or "prejudicial." The Court stated:

> [O]n its face, Rule 52(a) admits of no broad exceptions to its applicability. Any assumption that once a 'substantial right' is implicated it is inherently 'affected' by any error begs the question raised by Rule 52(a). Assuming there is a 'substantial right,' the inquiry remains whether the error 'affects substantial rights' requiring a reversal of the conviction. That kind of inquiry requires a review of the entire record.

474 U.S. at 448 n.11. On collateral review, principles of finality require an even higher showing to obtain reversal. See United States v. Frady, 456 U.S. 152, 166 (1982). Even a constitutional violation does not justify reversal unless the error "had a substantial and injurious effect or influence" on the verdict or sentence. Brecht v. Abramson, 507 U.S. 619, 623 (1993).

There is no reason to disregard harmless error analysis simply because Rule 32 contains a "bright-line" notification provision. The fact that Rule 32 is designed to avoid a time-consuming inquiry into whether defendants have been advised of their right to appeal in each case does not mean that, on those rare occasions in which the Rule is not followed, the consequence is automatic reversal. If a court can conclude that the purposes underlying the Rule have been served in a particular case, such that the defendant has suffered no prejudice, there is no reason to grant any relief at all. That is true when, as in this case, the defendant is aware of his right to appeal but makes a fully informed decision not to

appeal.[3] Although there was a technical violation of Rule 32 because petitioner received knowledge of his right to appeal from counsel rather than the court, petitioner's substantial rights were not affected by the violation, and the error was therefore harmless.

2. As petitioner notes, several courts of appeals have held that violation of Rule 32's notification requirement constitutes per se reversible error, even if the record shows that a convicted defendant was actually aware of his appellate rights. See Thompson v. United States, 111 F.3d 109, 110 (11th Cir. 1997); United States v. Sanchez, 88 F.3d 1243, 1247 (D.C. Cir. 1996); Reid v. United States, 69 F.3d 688, 689-690 (2d Cir. 1995); United States v. Butler, 938 F.2d 702, 703 (6th Cir. 1991) (per curiam); Paige v. United States, 443 F.2d 781, 782 (4th Cir. 1971); United States v.

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[3] This Court's decision in Rodriquez v. United States, 395 U.S. 327 (1969), is not to the contrary. Rodriquez dealt with the question whether a defendant who was deprived of his right to appeal because of his counsel's failure to file a timely notice of appeal was required to "show some likelihood of success on appeal" in order avoid characterization of the error as harmless. Id. at 330. The Court held that the likelihood of success was irrelevant in determining whether a defendant had been harmed by the deprivation of his right to appeal. Ibid. In rejecting the government's argument that the Court should remand the case so that the district court could obtain an affidavit from the defendant's counsel explaining why no notice of appeal was filed, the Court noted that the district court had failed to inform the defendant of his right to appeal and to request that the clerk file a notice of appeal. Id. at 331. Unlike in this case, however, there was no finding in Rodriquez that the defendant elected not to pursue an appeal. On the contrary, this Court reasoned that if the defendant had "known that the clerk would file a notice of appeal, he could easily have avoided the difficulties he has faced." Id. at 332. The Court in Rodriquez therefore had no occasion to consider whether a violation of Rule 32's notice requirement that does not prejudice the defendant constitutes harmless error.

Deans, 436 F.2d 596, 599 n.3 (3d Cir.), cert. denied, 403 U.S. 911 (1971); United States v. Benthien, 434 F.2d 1031, 1032 (1st Cir. 1970); see also Biro v. United States, 24 F.3d 1140, 1142 (9th Cir. 1994) (endorsing per se approach except when the defendant expressly waives his right to appeal); Everard v. United States, 102 F.3d 763, 766 (6th Cir. 1996) (per se rule does not apply when defendant knowingly and voluntarily waives his right to appeal), cert. denied, 117 S. Ct. 1011 (1997). Those decisions do not harmonize their results with this Court's decisions in Hill and Timmreck, precluding relief under Section 2255 for purely technical violations of procedural rules. Nor do they address cases such as Bank of Nova Scotia, Mechanik, Lane, and Hasting, in which this Court has rejected rules of automatic reversal in favor of case-by-case determinations whether a particular procedural violation has prejudiced the defendant. See, e.g., Thompson, 111 F.3d at 110; Sanchez, 88 F.3d at 1246-1247; Reid, 69 F.3d at 689; Biro, 24 F.3d at 1142; Butler, 938 F.2d at 703-704.[4]

Other courts have held that the district court's failure to advise the defendant of his right to appeal at sentencing does not warrant relief under Section 2255 if the defendant is otherwise

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[4] Three of those decisions -- Benthien, Deans, and Paige -- predate Timmreck. In addition, Benthien and Deans relied on McCarthy v. United States, 394 U.S. 459 (1969), in which this Court held that a trial court's failure to comply with the notice requirement of Rule 11 was per se reversible error. As the Eighth Circuit explained in United States v. Drummond, 903 F.2d 1171, 1173 & n.5 (1990), cert. denied, 498 U.S. 1049 (1991), Congress overturned McCarthy when it amended Rule 11 in 1983 to provide that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." See Fed. R. Crim. P. 11(h).

aware of his right to appeal. Tress v. United States, 87 F.3d 188, 189-190 (7th Cir. 1996); United States v. Drummond, 903 F.2d 1171, 1173-1175 (8th Cir. 1990), cert. denied, 498 U.S. 1049 (1991); see also United States v. Garcia-Flores, 906 F.2d 147, 148-149 (5th Cir. 1990) (applying harmless error test to violation of Rule 32 when judge informed defendant of right to appeal at rearraignment, two months before sentencing); Hoskins v. United States, 462 F.2d 271, 274-275 (3d Cir. 1972) (no relief required when judge informed defendant of right to appeal at the conclusion of trial, seven weeks before sentencing).

Although there is a conflict among the courts of appeals, the disagreement is not of sufficient importance to justify this Court's review. District courts almost always notify defendants of their appellate rights at sentencing. On the rare occasion when the district court omits to provide that notification, defense counsel is likely to do so, as petitioner's counsel did here. In any case, the government can avoid the error by reminding the court of its obligation. Thus, although the per se approach adopted by some courts of appeals is incorrect, it does not seriously threaten the finality of federal convictions.

Moreover, litigation regarding the issue presented by this case is likely to diminish in the future as a result of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (the Act). First, Section 105 of the Act amended Section 2255 to impose a one-year limitations period on motions filed under Section 2255. That provision may further

reduce the small number of cases in which a defendant who was actually aware of his appellate rights seeks relief under Section 2255 because the district court failed to comply with Rule 32. See, e.g., Pet. App. 15a (noting that petitioner filed his Section 2255 motion "some four-and-one-half years after his sentence"); Drummond, 903 F.2d at 1172 (petitioner challenged conviction under Section 2255 six years after sentencing); Thompson, 111 F.3d at 110 (collateral challenge to 1988 conviction reached court of appeals in 1997).

Second, Section 102 of the Act amended 28 U.S.C. 2253 to require a prisoner to obtain a "certificate of appealability" before appealing from a district court's denial of his Section 2255 motion. A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). Because a technical failure to comply with Rule 32's notification requirement does not deny the defendant any constitutional rights, Drummond, 903 F.2d at 1174, litigation brought by defendants over such failures in the future should be confined exclusively to the district courts.[5] The

[5] Indeed, a final consideration counseling against review in this case is that the court of appeals should not have reached the merits of the case because petitioner should not have received a certificate of appealability. Petitioner's request for a certificate (which the government did not oppose) failed to characterize the Rule 32 issue as "constitutional" but merely argued that it was a question "on which reasonable jurists differ." Defendant's Request for Certificate of Appealability 3. Likewise, although the district court's order granting a certificate of appealability identified the Rule 32 claim as the sole issue for appeal, C.A. App. 215, the court failed to consider whether that claim raised a substantial constitutional issue. See Young v. (continued...)

recent changes to the scope of federal collateral review thus provide a further reason why a grant of certiorari to review the narrow issue presented here is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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ELIZABETH D. COLLERY
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SEPTEMBER 1998

[5](...continued)
United States, 124 F.3d 794, 798-799 (7th Cir. 1997) (court must indicate in the certificate itself the specific issue or issues as to which petitioner has made a "substantial showing of the denial of a constitutional right"), cert. denied, 118 S. Ct. 2324 (1998).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

PEGUERO, MANUEL DEJESUS
Petitioner

vs.

USA

No. 97-9217

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION** by first class mail, postage prepaid, on this 2nd day of September 1998.

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Counsel of Record

September 2, 1998

(4)

No. 97-9217

In The

Supreme Court of the United States

October Term, 1998

MANUEL DEJESUS PEGUERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

JOINT APPENDIX

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Petition For Certiorari Filed May 22, 1998
Certiorari Granted September 29, 1998

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
v.	:	CRIMINAL NO.
MANUEL DEJESUS PEGUERO	:	1:CR-90-097-01

DISTRICT COURT DOCKET ENTRIES

DATE	DOCUMENT NO		
1990		USA V. PEGUERO	1:CR-90-097-01
Apr. 3	1	INDICTMENT	–5 COUNTS. CC: Ct; USA; USM; Prob; Deft; Def. Cnsl. pr
Apr. 3	2	ORDER	–that a warrant issue (SMYSER) AND
Apr. 4		WARRANT	–iss'd & handed to USM. cc: Ct; USA; USM; Prob; Deft; Def. Cnsl. pr
Apr. 3	3	ORDER	–that the indictmt be sealed & kept from public view. (SMYSER) cc: Ct; USA; USM; Prob; Deft; Def. Cnsl. pr
Apr. 5		JS2	COPY DKT to Scranton, Judge Caldwell. pr
Apr. 17	4	ORDER	–that the indictment be unsealed. (CALD) CC: Ct; USA; USM; Prob. pr

1991			
Oct 29	5	PETITION	–of govt for writ of HC. pr
Oct 30	6	WRIT	–of HAC, directing warden-Mid-State Correctional Facility, Wrightstone, NJ to produce deft 11/15/91, 9:30. cc: Ct; USA; USM (3 cert). pr
Nov 8	7	NOTICE	–init. appearance/ arraignmt set 11/15/91, 9:30. cc: MJ. Smyser; AUSA Daniel; USm; Prob. pr
Nov 14	8	NOTICE	–init. appearnce/ arraignmt reset from 11/15 to 11/19/91, 9:30. cc: MJ. Smyser; AUSA Daniel; USM; Prob; MacIntyre; Ct. Rptrs. pr
Nov 19	9	MIN SHT	–init. appearance. Deft present w/cns; advised of rights/chgs/potential penalties; requests & is approved for ct. apptd. cnsl; bail set CR (deft serving state sentence; govt may apply for detention if deft released). pr
May 19	10	FINANCIAL AFFIDAVIT	–of deft in support of app. for ct. apptd. cnsl. pr
Nov 19	11	ORDER	–setting conditions of release. Deft to appear

			when/where directed; released (to state custody) after processing. (SMYSWER) CC: USA; USM; Prob; Deft; Def. Cnsl. pr
Nov 19	12	OATH	–of stenographer Beth Ness to truthfully/accurately report proceedings. pr
Nov 19	13	P/T ORDER	–Trial will commence w/drawing of jury 1/13/92, 9:30. (CALD) cc: Ct; USA; USM; prob; Deft; Cnsl; Ct. Rptr; Ct. Dpty; Jury Clerk. pr
Nov 25	14	MOTION	–of deft for extension to file p/t motions. Conc. pr
Nov 25	15	BRIEF	–of deft in support of motion for extension. pr
Nov 26	16	RETURN	–arrest warrant executed by USM 11/18/91. pr
Nov 26	17	ORDER	–P/T motions shall be filed by 12/13/91 & accompanied by brief. Opp. brief to be filed w/in 10 days of svc of motion & no reply brief shall be filed. (CALD) cc: Ct; USA; Cnsl. pr
Dec 9	18	MOTION	–of deft to enlarge time to file p/t motions. Conc. pr

Dec 10	19	ORDER	–p/t motions to be filed on or before 12/20/91 accompanied by brief. Opp. brief filed w/in 10 days; no reply brief filed. (CALD) cc: Ct; USA; USM; Prob; Cnsl. pr
Nov 19	20	VOUCHER	#0465716 apptng atty Bickley to represent deft. pr
Dec 13	21	MOTION	–of deft to continue trial, to enlarge time to file p/t motions, & for order directing marshal to produce deft. pr
Dec 13	22	BRIEF	–of deft in support of motions to continue, to enlarge & to produce. pr
Dec 16	23	PETITION	–of govt for writ of HC. pr
Dec 17	24	WRIT	–of HC, directing warden – NJ State Prison to produce deft 12/27/91, 9:00. (CALD) cc: Ct; USA; USM (3 cert). pr
Dec 17	25	ORDER	–In consideration of deft motion to enlarge time, for continuance, & for order to prodce deft: 1)P/T motions may be filed until 1/8/92. 2)A writ has issued directing USM to produce deft 12/27/91. 3)Deft motion for continuance denied w/o prejudice. In event continuance is deemed necessary after

			consultation between deft & cnsl, motion & order shall comply w/requiremts of Speedy Trial Act. (CALD) cc: Ct; USA; Bickley. pr
1992			
Jan 2	26	NOTICE	–plea chg set 1/6/92, 2:00. cc: Judge Caldwell; AUSA Daniel; Bickley; USM; Prob; Interpreter; Deft; Warden-DCP; Ct. Rptr. pr
Jan 6	27	MIN SHT	–plea chg. Deft present w/cnsl & chgs plea to GUILTY. Sent. Deferred pend. presentence report. M.Zamika, RPR. pr
Jan 6	28	MOTION	–of deft to w/draw plea AND
		ORDER	–granting motion (CALD) AND
		PLEA	–deft in open court w/draws NG plea & pleads guilty to Ct. 1 of indictmt. cc: Ct; USA; USm; Prob; Deft; Def. Cnsl. pr
Jan 6	29	PLEA AGREEMENT	–Deft agrees to plead guilty to Ct. 1 of indictmt charging w/violation of 21:846. cc: Ct; USA; USM; Prob; Deft; Def. cnsl. pr

Jan 23	30	RETURN	–of writ executed by USM 1/6/92. jh
Apr 7	31	NOTICE	–sentencing set 4/22/92, 9:00. cc: J. Caldwell; AUSA Daniel; Bickley; USM; Prob; Deft; Warden-DCP; Ct. Rptr. pr
Apr 8	32	PETITION	–of govt for writ of HC. pr
Apr 8	33	WRIT	–of HC, directing warden–NJ State Prison to produce deft 4/22/92, 9:00. (CALD) cc: Ct; USA; USM (3 cert). pr
Apr 22	34	MIN SHT	sentencing. Deft present w/cnsl. Cnsl stips. to 3 level enhancement. Sent. imposed. M. Zamiska, RPR. pr
Apr 27	35	JUDGMENT	(IMPOSED 4/22/92) –Cts. 2, 3, 4 dism. on govt motion. Ct. 1 deft shall pay spec. assessmt $50.00. Deft committed to custody of U.S. Bur. of Prisons to be imprisoned for term of 274 months consecutive to sentence deft now serving in New Jersey. Deft remanded to USM custody. Upon release from impr., deft shall be on supervised release for term of 5 yrs. Add'l conditions: Deft shall report in

person to prdc. ofc in district to which he's released w/in 72 hrs of release from BOP custody; Supervised release shall be on non-reporting basis if deft is departed. If departed, deft may not reenter U.S. w/o permission of U.S. Atty General. **STATEMENT OF REASONS:** Court adopts factual findings/guideline application in presentence report except that there is a 3-level enhancement for role in offense. Fine is waived due to deft inability to pay. Sentence departs from guideline range pursuant to Section 5G1.3. (CALD) cc: Ct; USA; USM 3); Prob (2) BCF (5); Deft; Cnsl; Security; Financial; Terusso. pr

Apr 22		JS3	FILE TO REMAIN 10TH FLOOR HBG 30 DAYS. PR
May 5	36	APPROVAL	–of voucher #0465716 authorizing payment to Atty. Bickley in amt. of $792.00. (SMYSER) jh
May 8	37	RETURN	–of writ executed by USM. jh

1994			
Mar 30	38	RETURN	–arrest warrant executed 3/18/94. pr
May 4	39	RETURN	–J&C executed w/delivery of DFT to FCI-Schuylkill 4/28/94. pr
Aug 19	40	STENO NOTES/ TAPES(2)	–plea chg 1/6/92, sent. 4/22/92. M. Zamiska, RPR. (Loc. HN-23). pr
1995			
Jan 26	41	MOTION	–by dft for court to furnish transcripts. pr
Jan 26	42	BRIEF	–by dft in support of motion to furnish transcripts. pr
Jan 26	43	APPLICATION	–by dft to proceed in forma pauperis. pr
Feb 6	44	ORDER	–re: dft motion for free transcripts: it appeared that pages were missing; dft granted 20 days to file new motion. (CALD) cc: Ct; USA; Dft (w/enclosure) pr
Feb 13	45	MOTION	–(Amended) by dft in support of motion for transcripts. pr
Feb 13	46	MEMORANDUM	–by dft in support of motion for transcripts. pr

1995			
Feb 24	47	ORDER	–upon consideration of the dft's motion for free transcripts of his guilty plea and sentencing hearings, it is ordered that the motion is DENIED. (CALD) (cc: dft, USA, Ct, Security) cl
Mar 16	48	MOTION	–by dft for clarification of sentence. pr
Apr 3	DOCS 41 thru 48		sent to Scranton. pr
Apr 28	49	ORDER	–re: dft's motion for clarification sentence: motion, filed 3/16/95 is rendered moot by this order and is dismissed. (CALD) cc: Ct, USA, Dft, Security. pr
May17		DOC 49	sent to Scranton. pr
1996			
Sep 20	50	TRANSCRIPT	–sent. 4/22/92. (ZAMISKA, RPR) pr
Dec 10	51	MOTION	–by dft to vacate purs. to 28:2255. (civ. stat. #1:CV-96-2143 ass'd) pr
Dec 10	52	MOTION	–by dft for appointment of counsel. pr
Dec 10	53	BRIEF	–by dft in support of motion to vacate. pr
Dec 18	54	ORDER	–1) If dft has not already done so, he shall serve copy of his motion on U.S.

			Atty; 2) W/in 2 days of its receipt of motion or of this order (whichever is later), govt shall file response; 3) Dft shall thereafter have 10 days from his date of receipt of govt response to file reply brief. (CALD) cc: Ct, USA, Dft. pr
1997			
Jan 2	55	MOTION	–by govt for extension until 2/6/97 to respond to dft's 28:2255 motion. pr
Jan 3	56	ORDER	–granting govt ext. until 2/6/97 to respond to dft's motion. (CALD) cc: Ct, USA, Dft. pr
Feb 6	57	RESPONSE	–by govt to dft's 2255 motion. pr
Feb 12	58	PRAECIPE	–by govt requesting clerk to attach the Attached Exh. A to the govt's response to 2255 motion filed 2/6/97. pr
Feb 19	59	REPLY	–by dft to govt response to 2255 motion. pr
Feb. 26	60	TRANSCRIPT	–g/plea 1/6/92. M.Zamiska, RPR. pr
Apr 4	61	ORDER	–hrg set 4/21/97. 9:30 to address claims in 2255 motion. (CALD) cc: Ct. USA. USM. Prob. Dft. Ct. Rptr. Ct. Dpty. pr

Apr 6	62	MOTION	–by govt for continuance of 2255 hrg. pr
Apr 9	63	ORDER	–granting govt motion for continuance; hrg reset to 5/15/97. 2:30 p.m. (CALD) cc: Ct. USA. USM. Prob. Ct. rptr. Ct. dpty. pr
Apr 22	64	MOTION	–by dft for apptmt of cnsl. pr
Apr 23	65	ORDER	–granting dft motion for cnsl; FPD apptd. (CALD). cc: Ct. USA, Dft, FPD. pr
May 12	66	MOTION	–by dft to continue evid. hrg for 30 days. pr
May 14	67	ORDER	–granting continuance; hrg resched to 6/10/97 9:30. (CALD) cc: Ct USA USM Prob. Dft Cnsl Ct rptr. Ct Dpty. pr
May 23	68	CJA24	–paymt to M. Zamiska, $28.50 for transcript of g/plea & sentencing. pr
Jun 3	69	MOTION	–by dft for order directing prison visit. pr
Jun 3	70	ORDER	–granting motion for prison visit; Warden @ FCI-Schuyl is directed to permit cnsl & interpreter to enter prison 6/4/97 1:00 to meet w/dft (CALD) cc: Ct USA FPD; faxed to Warden @ FCI-Sch pr

Jun 4	71	AMENDED PETITION	–by dft for relief under 28:2255 pr
Jun 14	72	BRIEF	–by dft in support of amended 28:2255 petition. pr
Jun 6	73	BRIEF	–by dft in support of motion for downward departure. pr
Jun 6	74	EXHIBITS	–by dft to brief in support of motion for downward departure pr
Jun 9	75	EVIDENTIARY HEARING MEM-ORANDUM	–Filed by dft pr
Jun 10	76	MIN SHT	–2255 evident hrg. Dft present w/cnsl; witnesses called & dft rests; govt recalls witness & rests/ Court takes matter under advisement. M. Zamiska RPR pr
Jun 10	77	EXH LIST	–by govt w/attachment. pr
Jun 25	78	TRANSCRIPT	–of hrg 6/10/97. M.Zamiska RPR. pr
June 25	79	STENO NOTES	–of Manuel Dejesus Peguero's 6/10/97 hrg. on mtn. to vacate M. Zamiska, Crt. Rptr. (Transcribed) (NOTES IN BOX HN-74) asm

Jul 1	80	MEMO & ORDER	–dfts 28:2255 motion filed 12/10/96 and amended motion filed 6/4/97 are denied; dft's request for downward departure is denied w/o prejudice; clerk shall close the file (CALD) cc: Ct USA. Dft Cnsl. Security Civil Dktg. pr
Jul 8	81	RESPONSE	–by govt to dft's 28:2255 motion. pr
Jul 29	82	REQUEST	–by dft for cert. of appealability. pr
Jul 30	83	NOTICE OF APPEAL	–by dft to USCA of order denying 28:2255 on 7/1/97. cc: Ct. USA, USP. Ct. Rptr. Dft, Cnsl, USCA w/cert copy of dkt. memo & order. pr
Jul 30		REMARK	–TPO handed to Atty. pr
Jul 31	84	ORDER	–by J. Rambo granting request for cert. of appealability; same is limited to single issue identified at ground five of the dft's amended 28:2255 petition. cc: Ct, USA, Dft, FPD. pr
Aug. 18	85	APPELLATE COURT NUMBER	–assigned 97-7384 for the appeal filed 7/30/97. js

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERIGA	:	
	:	APPEAL NO.
v.	:	97-7384
MANUEL DEJESUS PEGUERO	:	

COURT OF APPEALS DOCKET ENTRIES

97-7384 USA v. Peguero

8/14/97	CIVIL CASE DOCKETED. Notice filed by Manuel D. Peguero. (cpm)
8/14/97	BRIEFING NOTICE ISSUED. Appellant brief and appendix due 9/23/97. (cpm)
8/14/97	ORDER appointing FPD to represent Appellant, filed. (cpm)
8/22/97	APPEARANCE from Attorney Kim D. Daniel on behalf of Appellee USA, filed. (cpm)
8/22/97	APPEARANCE from Attorney Daniel I. Siegel on behalf of Appellant Manuel D. Peguero #06524-067, filed. (cpm)
8/25/97	INFORMATION STATEMENT on behalf of Appellant Manuel D. Peguero #06524-067, received. (cpm)
8/27/97	TRANSCRIPT PURCHASE ORDER (Part I), ordering a transcript of the proceedings, filed. (cpm)
9/4/97	ORDER to Monica L. Zamiska directing transcript, ordered on 8/25/97, to be filed by 9/29/97, filed. (cpm)
9/8/97	TRANSCRIPT PURCHASE ORDER (Part III) notifying transcript, order on 8/25/97 filed in D.C. by Monica L. Zamiska, filed. (cpm)

9/26/97	BRIEF on behalf of Appellant Manuel D. Peguero #06524-067 Pages: 15, Copies: 10, Delivered by hand, filed. Certificate of service date 9/3/97. (cpm)
9/26/97	APPENDIX on behalf of Appellant Manuel D. Peguero # 06524-067 Copies: 4 Volumes: I, Delivered by hand, filed. Certificate of service date 9/23/97. (cpm)
10/22/97	BRIEF on behalf of Appellee USA, Pages: 13, Copies: 10, Delivered by mail, filed. Certificate of Service date 10/22/97. (par)
10/30/97	REPLY BRIEF on behalf of Appellant Manuel D. Peguero # 06524-067, Copies: 10, Delivered by hand, filed. Certificate of service date 10/30/97. (psc)
12/17/97	CALENDARED for Thursday, February 12, 1998. (mep)
2/12/98	SUBMITTED Thursday, February 12, 1998. (mep)
2/12/98	SUBMITTED Thursday, February 12, 1998 Coram: Greenberg, Nygaard and McKee, Circuit Judges. (mep)
2/27/98	MEMORANDUM OPINION (Greenberg, Nygaard, McKee, Authoring Judge, Circuit Judges), filed. Total MO Pages: 4. (lrb)
2/27/97	JUDGMENT: Affirmed, filed. (lrb)
4/20/98	MANDATE ISSUED, filed. (lkj)
6/2/98	Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellant Manuel D. Peguero. Filed in the Supreme Court on 5/29/98 at Supreme Ct. case number: 97-9217. (mmb)

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Caption omitted in printing)

INDICTMENT

COUNT I

THE GRAND JURY ALLEGES:

Between on or about March 1, 1989 through January 19, 1990, in the Middle District of Pennsylvania and elsewhere, the defendants

MANUAL DEJESUS PEGUERO,
a/k/a "Mimo",
a/k/a "Antonio Vidal",
a/k/a "Ricardo Concepcion";

ELIZABETH DIAZ,
a/k/a "Cindy Williams",
a/k/a "Sandy Williamson
a/k/a "Elizabeth Feliz"

MIGUEL FELECIANO-ROSARIO,
a/k/a "Pepe",
a/k/a "Ruben";

JACKIE TAVERAS;

ROBERTO ANDINO; and

JUAN SABORIT

did knowingly and intentionally combine, agree, confederate and conspire with Sergio Barillas, a/k/a Sergio Moro, Stephanie Markel, Dario Reyes, Dalysol Rodriguez, Janet Rebustillos and others, known and unknown, to distribute and possess with intent to distribute cocaine, and did, in fact, distribute in excess of 5 kilograms of

cocaine in York, Pennsylvania in violation of 21 U.S.C. § 841(a).

OVERT ACTS

In furtherance of said conspiracy, the following overt acts were committed by the defendants and their co-conspirators:

1. On divers occasions between March of 1989 and January of 1990, PEGUERO and DIAZ transported multiple-ounce to multiple-kilo quantities of cocaine between the New York, N.Y. area, York, Pennsylvania and the Washington, D.C. area.

2. Between June of 1989 and January of 1990, FELECIANO-ROSARIO and TAVERAS resided at 382 W. King Street, York, Pennsylvania and assisted PEGUERO and DIAZ in the storage, sale, and distribution of cocaine at that location.

3. On or about August 1, 1989, PEGUERO obtained a portable telephone, #(717)873-5296, under the name of Antonio Vidal, 382 W. King Street, York, Pennsylvania, and used said telephone for coordinating cocaine deliveries and sales between August of 1989 and January of 1990.

4. Between June and September of 1989, ANDINO and Bridgette Smith resided at 270 W. Market Street and 326 Gay Street, York, Pennsylvania, and assisted PEGUERO and DIAZ in the sale, storage and transportation of cocaine in the York, Pennsylvania area and elsewhere.

5. On September 27, 1989, ANDINO and SABORIT received approximately 52.6 grams of cocaine from PEGUERO and DIAZ in York, Pennsylvania and transported it to Westminster, Maryland.

6. On or about December 20, 1989, PEGUERO recruited Sergio Barillas in New Jersey to sell, store and transport cocaine for PEGUERO and DIAZ in York, Pennsylvania.

7. On or about January 8, 1990, DIAZ completed a rental application for an apartment at 606 W. Princess Street, York, Pennsylvania under the name of Sandy Williamson for the purpose of storing and selling cocaine at that location.

8. On or about January 12, 1990, DIAZ transported approximately six ounces of cocaine to 606 W. Princess Street, York, Pennsylvania.

All in violation of Title 21, United States Code, Section 846.

COUNT II

THE GRAND JURY FURTHER CHARGES:

On or about September 27, 1989, in the Middle District of Pennsylvania, the defendants

MANUEL DEJESUS PEGUERO,
a/k/a "Mimo",
a/k/a "Antonio Vidal",
a/k/a "Ricardo Concepcion";

ELIZABETH DIAZ,
a/k/a "Cindy Williams",
a/k/a "Sandy Williamson",
a/k/a "Elizabeth Feliz";

ROBERTO ANDINO; and

JUAN SABORIT

did knowingly and intentionally possess with intent to distribute approximately 52.6 grams of cocaine which ANDINO and SABORIT received from PEGUERO and DIAZ in York, Pennsylvania and transported to Westminster, Maryland.

All in violation of Title 21, United States Code, Section 841(a)(1); and Title 18, United States Code, Section 2.

COUNT III

THE GRAND JURY FURTHER CHARGES:

On or about January 13, 1990, in the Middle District of Pennsylvania, the defendants,

MANUEL DEJESUS PEGUERO,
a/k/a "Mimo",
a/k/a "Antonio Vidal",
a/k/a "Ricardo Concepcion"
and

ELIZABETH DIAZ,
a/k/a "Cindy Williams",
a/k/a "Sandy Williamson",
a/k/a "Elizabeth Feliz"

did knowingly and intentionally possess with intent to distribute approximately six ounces of cocaine within 1,000 feet of the Lincoln Elementary School on W. King

Street, York, Pennsylvania, at 606 W. Princess Street, York, Pennsylvania.

All in violation of Title 21, United States Code, Sections 841(a) and 845a, and Title 18, United States Code, Section 2.

COUNT IV

THE GRAND JURY FURTHER CHARGES:

Between on or about December 20, 1989 through January 13, 1990, in the Middle District of Pennsylvania, the defendant

MANUEL DEJESUS PEGUERO,
a/k/a "Mimo",
a/k/a "Antonio Vidal",
a/k/a "Ricardo Concepcion",

being at least 18 years of age, did knowingly and intentionally employ, hire, use, persuade, induce and entice one Sergio Barillas, a/k/a Sergio Moro, a person under 18 years of age, to conspire to distribute cocaine in violation of 21 U.S.C. § 846, and did knowingly provide and distribute cocaine to Barillas.

All in violation of Title 21, United States Code, Section 845b.

COUNT V

THE GRAND JURY FURTHER CHARGES:

Between on or about June 1, 1989 through January 19, 1990, in the Middle District of Pennsylvania, the defendants

MIGUEL FELECIANO-ROSARIO,
a/k/a "Pepe",
a/k/a "Ruben";

and

JACKIE TAVERAS

did knowingly maintain, manage, control and make available for use their apartment at 382 W. King Street, York, Pennsylvania for the purpose of unlawfully storing, distributing and using cocaine.

All in violation of Title 21, United States Code, Section 856.

/s/ Mary Ann Zelko
GRAND JURY FOREPERSON

April 3, 1990
Date

/s/ James J. West
JAMES J. WEST
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Caption omitted in printing)

TRANSCRIPT OF PROCEEDINGS
GUILTY PLEA

Before: Hon. William W. Caldwell, Judge

Date: January 6, 1992

Place: Courtroom No. 1 Federal Building Harrisburg, Pa.

COUNSEL PRESENT:

KIM D. DANIEL, Assistant U.S. Attorney

For – Government

L. REX BICKLEY, Esquire

For – Defendant

Monica L. Zamiska, RPR
Official Court Reporter

[p. 2] MR. DANIEL: Good afternoon, Your Honor. Your Honor, the government calls the case of the United States v. Manuel D. Peguero. This is the time and place scheduled by the Court for a change of plea in this case. Your Honor, in April of 1990 this case was indicted – the defendant was charged by way of indictment with four counts, among which include one count of conspiracy to distribute cocaine in excess of 5 kilos during the spring of 1989, the summer and fall of 1989.

MR. BICKLEY: Excuse me, Your Honor, I don't know how much the Court wants Mr. Peguero to understand of this, but we have the aid of an interpreter.

THE COURT: Would you try to indicate to the defendant –

THE INTERPRETER: Sure.

MR. DANIEL: Perhaps I should start –

THE COURT: Start over.

MR. DANIEL: Start over. Your Honor, in April of 1990 –

THE COURT: You can speak while he is.

THE INTERPRETER: Okay.

MR. DANIEL: In April of 1990 the defendant was charged by way of indictment with four counts, foremost of which was a count of conspiracy to distribute cocaine during calendar year 1989 and early '90 in the York, Pennsylvania [p. 3] area.

In November of this year the defendant was arraigned before this court on these charges and at that time entered his plea of not guilty to those charges. Since then the government and the defendant, through his attorney Rex Bickley, have entered into a written plea agreement which calls for the defendant's cooperation with the government in exchange for his plea of guilty to the conspiracy count. I would note that agreement provides that the government and the defendant agree that his personal involvement in this conspiracy involved no less than 15 kilos and no more than 15 – or 50 kilos of cocaine.

Mr. Bickley, do you agree with the essence of that agreement?

MR. BICKLEY: Yes. Now there is the provision, of course, that in the event that Mr. Peguero provides assistance to the United States government, the United States government will move for a reduction of sentence.

MR. DANIEL: Yes, Your Honor, the plea agreement contains a standard agreement regarding substantial assistance, and if in the event the government believes that Mr. Peguero has provided substantial assistance, the government may consider him for a downward departure.

THE COURT: Okay. What are the guideline ranges for this offense?

[p. 4] MR. DANIEL: Well, Your Honor, at 15 to 50 kilos we're talking about an offense level of 34, with a 4 level role in the offense enhancement will bring us to perhaps an offense level 38, and it's my understanding, Your Honor, that the defendant has two prior drug felony convictions from the state of New Jersey, in which case with a criminal history 3 and assuming an offense level of 38 –

THE COURT: Less 2, 1 guess.

MR. BICKLEY: Less 2.

MR. DANIEL: Less 2, Your Honor, makes that 36, would be 235 to 293 months. Of course, that presumes no other enhancements or any other reductions in the offense level calculation.

THE COURT: You're not seeking any other enhancement?

MR. DANIEL: There is the possibility of a firearms enhancement, Your Honor, and also part of the charge involved the distribution of cocaine within a thousand feet of a school. I'm not certain whether under the guidelines that were in effect in 1989 whether or not that would result in an increase in the offense level.

MR. BICKLEY: I don't know offhand, Your Honor. It was not my understanding that the government was necessarily going to pursue those enhancements.

THE COURT: Would the firearm enhancement affect [p. 5] this?

MR. DANIEL: Firearms could potentially increase it by another 2 levels, Your Honor. At this point, Your Honor, I'm just not sufficiently well-versed with the facts at this point to make a representation to the Court one way or the other as to that potential firearms enhancement.

THE COURT: Well, I want the defendant to understand what the implication of his plea might be. I don't think I can explain it to him adequately. Do you want –

MR. DANIEL: Could I have a minute, Your Honor, to speak with the investigators?

THE COURT: Do you want some time? We will take a five minute recess.

(A recess began at 2:10 p.m. and the case continued at 2:20 p.m.)

MR. DANIEL: Your Honor, during the break I had an opportunity to consult with the investigating officers in this case, and they have advised me, and I am now confident, that there is no basis in this case for a firearms enhancement.

THE COURT: How about selling drugs within –

MR. DANIEL: I also had an opportunity to review that, Your Honor. The indictment did include an allegation that 6 ounces of cocaine were sold within a thousand feet of a school during one day during the course of the conspiracy, but under the guidelines that offense would not have any net [p. 6] affect [sic] on his weight calculation.

MR. BICKLEY: Yes, Your Honor.

THE COURT: That's the extent of the plea agreement?

MR. DANIEL: Yes, Your Honor.

THE COURT: Would you tell Mr. Peguero that before I can accept a plea I must be satisfied that he's aware of his rights.

(The asterisk indicates the defendant answering through the interpreter Reynaldo Mora.)

THE DEFENDANT: *He understands.

THE COURT: I'm going to ask him some questions. I'd like him to answer me under oath.

THE DEFENDANT: *He understands, sir.

THE COURT: Would you swear the defendant.

Manuel DeJesus Peguero, called as a witness, being duly sworn, testified as follows:

THE DEFENDANT: *Yes.

THE COURT: Mr.Peguero, what is your age?

THE DEFENDANT: *Twenty-five years old, sir.

THE COURT: And where were you born?

THE DEFENDANT: *Dominican Republic, Your Honor.

THE COURT: How long have you been in the United States?

THE DEFENDANT: *Nine years.

[p. 7] THE COURT: Have you done any work?

THE DEFENDANT: *Yes, Your Honor.

THE COURT: What was it?

THE DEFENDANT: *Presser in a laundry, in a factory.

THE COURT: How much education have you had in the Dominican Republic?

THE DEFENDANT: *Up to high school, Your Honor.

THE COURT: Are you married?

THE DEFENDANT: *Yes, Your Honor.

THE COURT: Do you have children?

THE DEFENDANT: *Two children, Your Honor.

THE COURT: Where do they live?

THE DEFENDANT: *With their mother-in-law.

THE COURT: Where does she live?

THE DEFENDANT: *569 Montgomery Avenue, Jersey City, New Jersey.

THE COURT: Have you consulted with Mr. Bickley about your decision to change your plea?

THE DEFENDANT: *Yes, I did, Your Honor.

THE COURT: And has Mr. Bickley fully informed you of your rights so far as you know?

THE DEFENDANT: *Yes, Your Honor.

THE COURT: This case was listed for Monday, wasn't it?

[p. 8] MR. BICKLEY: That's correct, Your Honor.

THE COURT: If you didn't want to plead guilty, Mr. Peguero, you know you would be entitled to continue your not guilty plea and be tried by a jury beginning on Monday?

THE DEFENDANT: *He just wants to change his plea.

THE COURT: I understand, but he is aware he wouldn't have to do that if he didn't want to?

THE DEFENDANT: *Yes, he understands that.

THE COURT: Okay. Do you know that by pleading guilty you give up the presumption of innocence?

THE DEFENDANT: *I understand.

THE COURT: Do you know that by pleading guilty you relieve the government of the necessity to present evidence to the Court?

THE DEFENDANT: *I understand, Your Honor.

THE COURT: And your guilt is established by your admission to me here this afternoon.

THE DEFENDANT: *I understand, Your Honor.

THE COURT: You know also that by pleading guilty you give up your right to make any objections to any of the technical aspects of the case?

THE DEFENDANT: *I understand.

THE COURT: Has Mr. Bickley – are you satisfied with his services as your attorney?

THE DEFENDANT: *Yes, Your Honor.

[p. 9] THE COURT: You have entered into a plea agreement with the government.

THE DEFENDANT: *Yes.

THE COURT: And you have agreed to plead guilty to a conspiracy, you decided to plead guilty to conspiracy.

THE DEFENDANT: *I understand, Your Honor.

THE COURT: And do you know that a conspiracy is a combination of people who do illegal things?

THE DEFENDANT: *I do understand, sir.

THE COURT: In this case that illegal conduct was drug distribution.

THE DEFENDANT: *I understand, Your Honor.

THE COURT: It's been said to me that you agree that your involvement in this case with cocaine would be with not less than 15 kilograms and not more than 50.

THE DEFENDANT: *I understand, Your Honor.

THE COURT: And are you – I'm sure it has been, but Mr. Bickley has explained to you that penalties in these cases are controlled to some extent by the quantity of drugs involved?

THE DEFENDANT: *I understand, Your Honor.

THE COURT: You understand that. Has Mr. Bickley explained the sentencing guideline scheme to you?

THE DEFENDANT: *Yes, Your Honor, it was explained.

THE COURT: The government has calculated that based [p. 10] on your role in the conspiracy and giving you credit for accepting responsibility preliminarily at least it appears that your sentence will be in the range of 20 years and upwards.

THE DEFENDANT: *He understands that.

THE COURT: It's possible that the government, if you cooperate and lend substantial assistance in connection with others accused of crime, that the government might ask the Court to reduce your sentence.

THE DEFENDANT: *He understands, yes.

THE COURT: And do you understand that that's the only way your sentence can be reduced? I cannot reduce it on my own.

THE DEFENDANT: *He understands, Your Honor.

THE COURT: And do you understand that I can't control whether the government would make that request, it's entirely up to the government?

THE DEFENDANT: *He understands, sir.

THE COURT: I'm going to ask Mr. Daniel to tell me briefly what your role in this conspiracy was, and then I'll ask you whether he's made a fair description of your involvement.

THE DEFENDANT: *He understands.

THE COURT: All right, Mr. Daniel.

MR. DANIEL: Your Honor, if this case had gone to [p. 11] trial the government would have shown that in the spring of 1989 the defendant and his girlfriend Elizabeth Diaz moved to York, Pennsylvania from northern New Jersey for the purpose of selling cocaine.

The defendant came to York or was soon followed t6 York by his friend Miguel Feleci-ano-Rosario and his girlfriend Jackie Taveras.

An apartment was obtained at 382 West King Street which became the primary focus for their joint cocaine distribution activities.

Various customers in the York area were recruited by the defendant and Mr. Feleciano-Rosario. Foremost of whom was Roberto Andino, Juan Saborit, Stephanie Markle, Dalysah Rodriquez, Dario Reyes and Janet Rubestillo. (phonetically) These latter people would have all been called by the government and would have offered their testimony regarding the cocaine transactions they had with the defendant.

Their testimony would have shown that during the summer and the fall of 1989 and into early January of 1990 somewhere between 15 and 50 kilos of cocaine were obtained by the defendant and his friend Miguel Feleciano-Rosario in the northern New Jersey, New York City area and transported to York for subsequent multiple ounce sales.

Elizabeth Diaz would have also testified that some of this cocaine was also transported to the Washington, D.C. [p. 12] area.

Beyond the people that I have already identified, the government would have also produced the testimony of Byron Hall, Brian McCleaf and one Timothy Hartless who also engaged in multiple ounce purchases of cocaine from the defendant.

That's essentially a summary of the evidence, Your Honor.

THE COURT: Is that a fair statement or do you wish to add anything?

THE DEFENDANT: *I don't wish to say anything else, Your Honor. I just want to plead guilty and get on with the sentencing.

THE COURT: I just want to know if Mr. Daniel has made a fair statement about his participation.

THE DEFENDANT: *He understands, Your Honor.

THE COURT: Okay, do you have any questions about anything?

THE DEFENDANT: *When is going to be the sentencing, Your Honor?

THE COURT: The sentence would be in probably a month after the presentence report has been prepared.

THE DEFENDANT: *He understands.

THE COURT: Do you think you understand everything?

THE DEFENDANT: *Yes, sir.

THE COURT: One thing I didn't ask you, Mr. Peguero, [p. 13] you're prior convictions are one of the reasons the range of the guidelines is as high as it is. Do you understand that?

THE DEFENDANT: *He understands, Your Honor.

THE COURT: Anything else, Mr. Daniel?

MR. BICKLEY: No, Your Honor.

MR. DANIEL: No.

THE COURT: We have covered everything. I think Mr. Peguero has made a voluntary decision, and we accept his plea to Count 1, 1 guess it is, –

MR. DANIEL: Yes, Your Honor.

THE COURT: – of the indictment.

We will, continue the matter pending the presentence report, and we'll schedule sentencing. Thank you.

MR. DANIEL: Thank you.

(The proceedings concluded.)

I hereby certify that the proceedings and evidence of the court are contained fully and accurately in the notes taken by me on the guilty plea of the within cause, and that this is a correct transcript of the same.

/s/ Monica L. Zamiska
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Caption omitted in printing)

TRANSCRIPT OF PROCEEDINGS
SENTENCING

Before: Hon. William W. Caldwell,

Date: April 22, 1992

Place: Courtroom No. 1 Federal Building Harrisburg, Pa.

COUNSEL PRESENT:

KIM D. DANIEL, Assistant U.S. Attorney

For – Government

L. REX BICKLEY, Esquire

For – Defendant

Monica L. Zamiska, RPR
Official Court Reporter

[p. 2] INDEX TO WITNESS

Direct Cross Redirect Recross

For the Defendant:

Manuel Dejesus Peguero

[p. 3] MR. DANIEL: Your Honor, this is the time and place scheduled for sentencing in the case of the United States of America v. Manuel Peguero. Your Honor, in April of 1990 an indictment was returned charging the defendant with conspiracy to distribute cocaine and four or five additional substantive counts. In January of this year pursuant to a written plea agreement the defendant

pled guilty to the conspiracy count. Since that time a presentence report has been prepared, objections were filed, and the defendant and his attorney are present in the courtroom for sentencing.

THE COURT: All right. Mr. Bickley, are there objections that need to be pursued?

MR. BICKLEY: Well, Your Honor, the only objection that I raised was the 4 point enhancement regarding Mr. Peguero's alleged role in this offense. I have spoken to Mr. Peguero, and it is his position that although he was involved in the sale and distribution of narcotics, it was a Mr. Felez-Rosario who was actually the organizer, ringleader. He was employed, in every sense of the word employed by Mr. Rosario, and I would like to pursue that with testimony from Mr. Peguero.

THE COURT: Okay, fine. I'd suggest that if we're going to have a little hearing here, that we have Mr. Peguero sworn and take the stand and you can go to counsel table.

MANUEL DEJESUS PEGUERO, called as a witness, being [p. 4] duly sworn, testified as follows:

(The asterisk indicates the defendant speaking through the interpreter.)

THE CLERK: Please state your full name for the record please.

THE DEFENDANT: *Manuel DeJesus Peguero.

DIRECT EXAMINATION

BY MR. BICKLEY:

Q Mr. Peguero, you understand that you're here to be sentenced for selling drugs?

A *Yes.

Q I would like you to explain to the Court briefly your involvement with respect to the sale of drugs and specifically who was the organizer or boss of this operation?

A *The only guy I know is Pepe, and he was the boss, and I met him in a bar through his mother. Through his mother I met him.

Q And where was that?

A *I met him in a bar in New Jersey at the address of West – West and Seventeenth Street in the corner.

Q And with respect to the sale of narcotics, he was the one who – or you tell me, who was the one who made decisions with respect to the sale of drugs?

A *He was selling the drugs, and then he said that soon I would be selling it also. Depending on what was sold, he [p. 5] would make the deliveries, and he started on the streets. Then I working for him. I make all deliveries for him.

Q Everything was done under his control. Is that correct?

A *He was my boss.

MR. BICKLEY: Mr. Daniel.

CROSS EXAMINATION

BY MR. DANIEL:

Q Mr. Peguero, do you recall when you came to York, Pennsylvania to start to sell drugs?

A *More or less, yes, I do.

Q It was in the spring of 1989. Isn't that correct?

A *Yes, around April.

Q And you had a girlfriend by the name of Elizabeth Diaz. Isn't that correct?

A *Yes.

Q And she came with you to York, Pennsylvania in the spring of 1989 to sell drugs. Isn't that correct?

A *Yes, with me and Pepe and four others and his girlfriend Jackie Taveras.

Q But isn't it true, sir, that you and Elizabeth Diaz came to York first, just the two of you, and the two of you then rented an apartment at 382 West King Street in York?

A *Yes, Pepe gave me the money and got me the apartment.

Q And you were in York for at least a month before Pepe [p. 6] And Jackie Taveras came to you. Isn't that correct?

A *Yes, a month.

Q And you had a friend in York, didn't you, by the name of Roberto Andino, who happened to be a relative of your ex-wife? Isn't that correct?

A *Yes.

Q And Roberto Andino was instrumental in helping you get introduced and acquainted with the various drug users and drug dealers in York with whom you had to do business. Isn't that correct?

A *Yes, he did help me.

Q He took you around town and got you business for your cocaine operation. Isn't that correct?

A *He got all the contacts because I didn't know nobody.

Q Then about a month later Pepe and Jackie Taveras came to York and moved into 382 West King Street with you and Elizabeth Diaz, and together the four of you lived there together for a while?

A *Well, you're – well, he knew prior to him coming.

Q Yes, but my question is didn't Pepe and Jackie Taveras move into the apartment with you and Elizabeth Diaz at 382 West King Street, and didn't the four of you live there together for a while?

A *Yes.

Q And isn't it true, sir, that then after that you and [p. 7] Elizabeth moved out of 382 West King Street and started living in various motels in York?

A *After he came, he got himself an apartment, I moved out.

Q Didn't you also live in motels for a period of time?

A *Pepe used to rent me the motels sometimes.

Q No, I'm asking you whether you and Elizabeth stayed in motels in York during the summer of 1989?

A *Just one day and two days.

Q And isn't it true, sir, that you and Pepe agreed to use the premises at 382 West King Street, that apartment, as the place for people to come and buy drugs?

Q *Yes, Pepe did use that for that.

And isn't it true that you took out a telephone under a false name, a portable telephone, and you used that portable telephone to relay instructions to Pepe at 382 West King Street about whom to sell to and for what prices?

A *No, Pepe was the one who was in charge of it. He did all the decisions.

Q And isn't it true, sir, –

A *I was there when Pepe told me what to do.

Q Isn't it true, sir, that you and Pepe together would drive to New York, to either Manhattan or to northern New Jersey, to obtain multiple ounces or kilos or half kilos of cocaine?

[p. 8] A *Well, all the people he sold it to he did introduce me to them.

Q I'm sorry, I didn't hear the last answer.

A *All the people he took me to he introduced me to them.

Q You went to New York City with Pepe to obtain the cocaine. Isn't that correct?

A *Yes, we did.

Q Sometimes Elizabeth Diaz accompanied you, sometimes Jackie Taveras accompanied you on these trips?

A *Yes, yes, yes.

Q And didn't you have about four or five people that you obtained cocaine from in northern New Jersey and Manhattan?

A Four or five people, yeah.

Q And isn't it true that most of the times it was your money that was used to buy the cocaine but on some occasions Pepe would chip in some money, too?

A *I never gave money to buy drugs.

Q And isn't it true that one of the persons that you dealt with was a man by the name of DeOleo?

A *Yes, sir, I know him.

Q He was one of the people that supplied you with large quantities of cocaine in New York City?

A *Pepe would make the contact with him, give him the money, and then Pepe would contact me so I would go pick it up.

[p. 9] Q You dealt directly with DeOleo. Isn't that true?

A *Well, I used to talk to him.

Q Did you obtain cocaine from DeOleo directly?

A *Yes.

Q And didn't he have a dress shop of some sort in Manhattan?

A *Well, when I – when I get back to where I got to get it, the address was there. Oh, he's talking about the address of the store.

Q Have you been to that dress shop, sir?

A *Yes, a couple of times.

Q And you went there to get cocaine. Isn't that correct?

A *He never gave me the cocaine there. It was in the park.

Q And isn't it true, sir, that in the summer of 1989 there was a dispute with DeOleo that you owed him $20,000 for a kilo of cocaine and DeOleo came to York, Pennsylvania with some of his friends and they kidnapped Elizabeth Diaz and took her back to New York? Do you remember that?

A *That's true, but I don't know how much I owed him.

Q Isn't it true that you gave DeOleo some money so that he would let Elizabeth go?

A *Never gave nobody any money.

Q He released Elizabeth, didn't he, after a while?

A *Si. Well, he let her go.

[p. 10] Q You were afraid of DeOleo, aren't you?

A *Yes, I was scared of him. I was very scared.

Q In fact the very first time that you talked to Mr. Miller here the day you entered your guilty plea, you denied to him that you even knew Mr. DeOleo. Isn't that correct?

A *DeOleo knows where my family lives at, my daughter, my mother, and I was afraid if I told them that I knew him, that he might tell Deoleo and DeOleo might kill my family.

Q My question is though, sir, isn't it true that you told Mr. Miller that you didn't even know Mr. DeOleo?

MR. BICKLEY: Your Honor, I'm not sure how this is particularly relevant at this point. We're going to indicate to the Court that Mr. Peguero did sit down and talk to Mr. Miller, and he wasn't as forthright as he perhaps ought to have been and is willing to be now. If there is any indication with respect to Mr. Peguero's relationship with Mr. DeOleo that would indicate that in some way he was an organizer, dealer, that may be important, but I don't see how it is relevant at this given time. He didn't say anything to Mr. Miller.

MR. DANIEL: That's my point, Your Honor.

MR. BICKLEY: Mr. Peguero sat down with Mr. Miller and he didn't indicate to Mr. Miller at that time that he knew DeOleo, this guy DeOleo. He's now admitting that he does. It is the nature of the relationship, if anything, that seems to [p. 11] be important.

THE COURT: I understand.

BY MR. DANIEL:

Q All right, Mr. Peguero, isn't it true that you often supplied Roberto Andino with large quantities of cocaine in York at two apartments he had on Gay Street and on Market Street in York during the summer of '89?

A *To pick up the drugs he always went to Pepe's apartment.

Q Did you ever deliver cocaine to Mr. Andino at his apartments on Gay Street and Market Street in York during the summer of '89?

A *Never, he always came to pick it up.

Q Did Mr. Roberto Andino have a girlfriend by the name of Bridgette Smith?

A *I don't know. He had a black woman, two Puerto Rican women, I don't know.

Q Well, do you remember when Mr. Andino was arrested in Maryland by the Maryland State Police in the early fall of 1989?

A *Yeah, they had told me that he got arrested.

Q Do you remember when Bridgette Smith called you up on the telephone or I think came to see you and asked for your help in getting Mr. Andino a lawyer in Maryland?

A *No.

[p. 12] Q Do you remember telling Bridgette Smith that you wouldn't give her any cash for a lawyer but that you would agree to front her cocaine so that she could

sell the cocaine and raise sufficient money to hire a lawyer for Roberto in Maryland?

A *No, I never gave any drugs to get a lawyer. Well, she continued to do dealings with Pepe, but I never gave her anything.

Q And if she testified to that, she would be lying?

A *If she's saying that I gave her drugs, she's lying.

Q And if Elizabeth Diaz testified that you were the boss, would she be lying?

A *Yes, she's lying.

Q And if Jackie Taveras testified that you were the boss, would she be lying?

A *She's lying.

Q Who is Sergio Barillas?

A *I met him at the same bar that I met Pepe, and he told me if I could bring him to Pennsylvania.

Q He was an illegal alien that you met in northern New Jersey, isn't that correct, during the late fall of 1989?

A *I don't know if he was an illegal alien.

Q He's from Central America, isn't that correct, and under the age of 18?

A *Oh, he told me he was from Peru and that he had an ID [p. 13] and a driver's license. He was overage.

Q And you recruited him, did you not, and brought him to York to sell drugs for your operation here in York? Isn't that correct?

A *No, Pepe did.

Q And he was under the age of 18. Isn't that correct?

A *Well, I don't know.

Q And wasn't he arrested one day in December of 1989 with Elizabeth Diaz at an apartment that you were moving into with Elizabeth in York, and weren't they arrested with the 6 ounces of cocaine that was found inside that apartment? Do you remember that?

A *Yes, I remember that.

Q Pepe wasn't living at that apartment, was he?

A *When he came to York, Pennsylvania, he stayed in the same address, at 382 King.

Q I'm not talking about 382 West King Street. I'm talking about the new apartment that you and Elizabeth Diaz were in the process of moving into at the time she was arrested along with Sergio Barillas with 6 ounces of cocaine.

A *Well, that was Pepe's dealing, and I really don't know too much about it.

Q My question is Pepe wasn't living there, was he?

A *No, he never lived there. It was only two days old that we had just rented.

[p. 14] Q It was your apartment and Elizabeth's apartment. Correct?

A *Yes, we did rent there together.

Q And isn't it true, sir, that you and Elizabeth Diaz also moved and lived for a while in the Washington, D.C. area during the summer of 1989?

A *Well, I lived there about a month in Washington, D.C. because I wanted to get away from York.

Q Well, isn't it true that you and Elizabeth were selling cocaine down there in the Washington, D.C. area during the summer of 1989?

A *Never. I didn't know nobody over there.

Q And if Elizabeth Diaz testified in Pepe's trial and Roberto Andino's trial that you were routinely ferrying cocaine from New York City to the greater Washington, D.C. area and up to York and supplying Pepe at 382 West King Street, would that be a lie, would that be false?

A *Well, Pepe told me to go take it over there and then I delivered to Washington, D.C. and York.

Pepe never went to Washington, D.C., did he?

A *Yes, he did.

Q Did he go there with you?

A *Yes, he went with me. He had friends over there.

Q And if Sergio Barillas testified in Pepe's trial that you were the one that recruited him to come to York, Pa. and [p. 15] to sell drugs for you, not Pepe, would that be a lie too?

A *He says that Barilla never get to see Pepe.

Q What did you do with your share of the profits, sir?

A *I used to get around 4 and 6 hundred dollars a week. Whatever I made, I used to spend on drugs for myself or on miscellaneous items.

Q You knew about Elizabeth's safe deposit box, didn't you?

A *When she didn't use, she didn't use drugs, whatever she made, she saved it.

Q The question is did you know about the safe deposit box she had in New Jersey?

A *Yes.

Q And you knew that she would keep thousands and thousands of dollars in that safety deposit box which were the profits of your drug dealing activities. Isn't that correct?

A *That's all her money.

Q Pardon?

A *That's all her money.

Q Okay. Did you know that she told the investigators about that box and that some cash was seized from that box?

A *Her mother told me.

Q Did Pepe have a car phone?

A *Yes, we both used it, little portable phone, that's what it was.

[p. 16] Q Did he have his own or did he use yours?

A *I used his.

Q Well, didn't you rent the car phone out under the false name of Roberto Adolf? Excuse me, Antonio Vidal. Roberto Vidal. Excuse me, Antonio Vidal.

A *What happened was he told me how to rent it. He got all the information, and he told me to rent it out of that name.

Q Isn't it true that you used that portable phone as you drove around in that Corvette that you drove during the summer of '89 in York?

A *No, that phone Pepe used it all day long.

Q Did you have a white Corvette, sir?

A *It wasn't mine. That Corvette belonged to Elizabeth.

MR. DANIEL: I have no other questions, Your Honor.

THE COURT: Okay, anything further?

MR. BICKLEY: No, Your Honor.

THE COURT: Thank you.

MR. DANIEL: Your Honor, Mr. Bickley has indicated he has nothing further to add with respect to this issue. I do have, Your Honor, copies of the trial testimony of the various government witnesses, including Elizabeth Diaz, Sergio Barillast Bridgette Smith, Jackie Taveras from the Andino and Pepe trial in November of 1990, and we would offer it as an exhibit in support of our request for the 4 level [p. 17] enhancement.

MR. BICKLEY: Your Honor, I guess I have a problem with that, only in the sense that I was not a part

of that proceeding, am not in a position to question these folks as to what they said, may have said, the extent to which they may have or may not have implicated Mr. Peguero with respect to this one particular issue.

THE COURT: What is your position, Mr. Daniel, with the relative roles of Mr. Peguero and is it Pepe, was that his handle?

MR. DANIEL: Yes, Your Honor, it was our position and it is – at Pepe's sentencing, as it is today, that "Mimo" was the leader of this operation, Mr. Peguero. Mr. Feliciano-Rosario or Pepe, as he's known, was a mid level manager in that operation. "Mimo," was totally at the top. Pepe was at the middle somewhere. Pepe ran the premises at 382 West King Street where the people went for the retail sales, but it was "Mimo" who was the boss.

Through the testimony of Elizabeth Diaz, his girlfriend; Bridgette Smith, who was Roberto Andino's girlfriend; and Jackie Taveras, who was Pepe's girlfriend, all three were fairly consistent on that point that it was "Mimo" who had the idea to bring the operation from northern New Jersey to York in the first place.

"Mimo" came there with Elizabeth Diaz first, found [p. 18] the apartment, set up the apartment, made the contacts with Roberto Andino and got the business running. Thereafter he brought Pepe with him to York, and Pepe moved into 382 West King Street and became the manager of that location.

"Mimo" expanded the operation and moved the operation into the greater Washington, D.C. area during the summer of '89 but throughout the time coordinated

all the activities that were going on in York. He was the one who made the arrangements for the cocaine purchases in northern New Jersey, in York through people like Roberto DeOleo. He was the one that brought the cocaine to York and to Washington, D.C. with Elizabeth Diaz.

On occasion Pepe would accompany him to New York to help him bring the cocaine back, and there was specific testimony from Elizabeth Diaz, Your Honor, that mainly it was "Mimo" whose moneys were used to buy the cocaine but on occasion Pepe would chip in his own money to help him buy a kilo. That's why at Pepe's sentencing, Your Honor, we asked for a 2 level enhancement for his role in the offense, not a 4 level enhancement. We believe that a 4 level enhancement is proper for this defendant.

THE COURT: All right. I would like to talk to counsel at side bar. Please be seated.

(A discussion was held off the record at side bar.)

THE COURT: We'll take a 10 minute recess.

[p. 19] (A recess began at 10:10 a.m. and the case continued at 10:20 a.m.)

MR. BICKLEY: Your Honor, may we approach the bench one more time please.

(A discussion was held off the record at side bar.)

THE COURT: Are you ready to proceed on the record, gentlemen?

MR. DANIEL: Yes, Your Honor.

MR. BICKLEY: Yes.

MR. DANIEL: Your Honor, I believe that in the interim counsel for the defendant and the government have reached a stipulation with respect to the applicable role in the offense enhancement. Correct me if I'm wrong, Mr. Bickley, but I believe we have agreed that the government will withdraw its request for a 4 level enhancement and stipulate to a 3 level enhancement being applicable. Is that correct, Mr. Bickley?

MR. BICKLEY: That's correct.

THE COURT: All right, and I want the record to show that the government's position for a 4 level enhancement was something that was going to require me to review some transcripts, and if Mr. Daniel's position on the law was correct as a result of a Third Circuit opinion that I could consider that evidence, in all probability we would have gotten to a 4 level enhancement. So that I think the [p. 20] defendant's best interests are served by entering into this stipulation for a 3 level enhancement, which changes the applicable guideline range significantly.

Would you ask your client, Mr. Bickley, when his service on that New Jersey sentence will end or when he will get out on parole.

MR. BICKLEY: He says maybe 2 years more or less, although he said he's uncertain.

THE COURT: Thank you. All right, are you ready to proceed then with the sentencing?

MR. BICKLEY: Yes, Your Honor.

THE COURT: Would you have Mr. Peguero come up.

Do you have anything further, Mr. Bickley, that you'd like to say on the question of sentencing?

MR. BICKLEY: Yes, Your Honor. Your Honor, Mr. Peguero is I believe 25 years old, has a wife and several children.

THE COURT: Where are they?

MR. BICKLEY: They are I believe in New Jersey. Is that correct?

THE DEFENDANT: Yeah.

THE COURT: Okay.

MR. BICKLEY: It is true that he participated in the sale of narcotics for which he is appearing before you for purposes of sentencing. Almost from the very outset, however, [p. 21] Your Honor, Mr. Peguero came to me and indicated a willingness to cooperate and a willingness to enter a plea of guilty. Now at that time he was somewhat uncertain as to the nature of his sentence, but in any event, he did indicate he wanted to plead guilty, he wanted to cooperate and get this behind him to the extent to which he could, and he has done exactly that. He has pled guilty, and he did sit down and talk to Mr. Miller of the DEA.

Now it is true, as we alluded to earlier in today's proceeding, that there was some information which he failed to disclose to the authorities primarily because he was concerned not so much about his own safety but the safety of his mother, his wife, his children. He is prepared

to talk to the authorities at this point and disclose whatever it is he knows about the drug activities and also another very important matter I understand which is occurring in New Jersey, but, in any event, he does want to cooperate. He has been cooperating with the exception of this one particular situation. I think that there is certainly a plausible reason for your family in this sort of business, that's certainly understandable.

I would ask that the Court let me back track just a moment. I believe that the applicable sentencing range now with our computation is 292. 1 think that's correct.

THE COURT: That's correct.

MR. BICKLEY: Because he is being sentenced under [p. 22] the new guidelines the Court does have the discretion pursuant to 5G1.3 to take into consideration the fact that Mr. Peguero is presently serving a sentence in New Jersey, and I would respectfully request the Court to reduce the minimum range of the sentence to something a little bit more reasonable, something a little bit fairer, so that at some point in his life he will be released and be able to rejoin his family.

THE COURT: Okay. Mr. Peguero, would you like to speak yourself this morning on the matter of sentencing?

THE DEFENDANT: *I'm asking for forgiveness to the Court, and I do want to see my kids again. I want to help them and I want them to go to school.

THE COURT: I'm sure, Mr. Peguero, the guideline sentencing scheme has been explained to you, and I'm sure you understand that the Court is required to

follow those guidelines in imposing sentence. So based upon your prior criminal record and the quantity of drugs involved in this conspiracy your sentence must be a substantial one. I'm sure you understand that.

Mr. Daniel, do you have anything further you wish to say?

MR. DANIEL: Your Honor, I simply would like to focus the Court's attention on Mr. Peguero's lengthy narcotics trafficking history, a series of four incidents in New Jersey between September 1987 and November of 1988. Three of which [p. 23] were consolidated for sentencing on April of 1991, just about a year ago, and then his release on bail on those charges and his coming to York during the spring of 1989 to begin drug dealing here.

We've discussed the applicability of Section 5G1.3 under the guidelines which grants the Court some discretion-to fashion an appropriate sentence based upon his New Jersey sentence, and I just simply want to direct the Court's attention to application note 4 that concerns that provision and the last sentence which says in fashioning an appropriate incremental punishment the Court should consider whether the offense was committed while the defendant was on bail or other release status from another offense. In such cases a reasonable incremental penalty appropriately would include an additional enhancement equivalent to that provided under Section 2J1.7 which concerns commission of an offense while on release. Well, Your Honor, Section 2J1.7 allows for a 3 level increase in the offense guideline score. Now the government is not specifically asking the Court to do that

in this case, but we're simply making the point to Your Honor that the Court should take these factors into consideration in picking an appropriate number from the applicable range.

THE COURT: All right, thank you.

We are dealing with a guideline range of 292 to 365 months and, of course, I am acutely conscious of the fact that [p. 24] these offenses occurred while the defendant was on bail in New Jersey and those cases have now been disposed of by a sentence of 10 years of which the defendant must serve 4 as I understand it.

MR. BICKLEY: Yes, Your Honor.

THE COURT: I think there are points to be made on both sides of the issue. I believe that the guidelines provide very heavy penalties in this particular case, and pursuant to 5G1.3 I am going to depart somewhat below the guideline range of 292 months in an effort to reach what I feel is a fair disposition. I'm conscious of the increment which could be added under 2J1.7 and because of that the adjustment that I make is not as great as it might have been.

Pursuant to the Sentencing Reform Act it is the judgment of the Court that the defendant Manuel Peguero be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 274 months, which sentence shall be consecutive to the sentence that the defendant is now serving in the state of New Jersey.

Upon release from imprisonment we direct that the defendant be placed on supervised release for a term of 5 years.

Within 3 days of release from the custody of the Bureau of Prisons the defendant shall report in person to the probation office in the district to which he is released.

[p. 25] Supervised release shall be on a non-reporting basis should the defendant be deported.

While on supervised release the defendant shall comply with the standards conditions that have been adopted by this court, and in addition, if he is deported, the defendant may not reenter the United States without the permission of the Attorney General of the United States.

Finally, we direct that the defendant pay the United States the special assessment of $50 required by law.

MR. DANIEL: Your Honor, we would move at this time for dismissal pursuant to the plea agreement of counts 2 through 5 of the indictment.

THE COURT: All right, we'll dismiss those counts pursuant to that motion.

(The proceedings concluded.)

I hereby certify that the proceedings and evidence of the court are contained fully and accurately in the notes taken by me on the sentencing of the within cause, and that this is a correct transcript of the same.

/s/ Monica L. Zamiska
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DEFENDANT'S PRO SE MOTION UNDER 28 U.S.C. § 2255

FORM FOR MOTIONS UNDER 28 U.S.C. § 2255

MANUEL DEJESUS PEGUERO
Name 06524-067

FCI SCHUYLKILL MINERSVILLE, PA.
Prison Number

UNIT 1A FCI SCHUYLKILL MINERSVILLE, PA. 17954
Place of Confinement

United States District Court MIDDLE District of PENNSYLVANIA

Case No. _____ (to be supplied by Clerk of Court)

United States,

MANUEL DEJESUS PEGUERO
(full name of movant)

(If movant has a sentence to be served in the *future* under federal judgment which he wishes to attack, he should file a motion in the federal court which entered the judgment.)

MOTION TO VACATE, SET ASIDE, OR
CORRECT SENTENCE BY
A PERSON IN FEDERAL CUSTODY

INSTRUCTIONS – READ CAREFULLY

(1) This motion must be legibly handwritten or typewritten, signed by the movant under penalty of perjury. Any false statement of a material fact may serve as the basis for prosecution and conviction for perjury. All questions must

be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt, your motion will be filed if it is in proper order. No fee is required with this motion.

(4) If you do not have the necessary funds for transcripts, counsel, appeal, and other costs connected with a motion of this type you may request permission to proceed *in forma pauperis*, in which event you must execute the declaration on the last page, setting forth information establishing your inability to pay the costs. If you wish to proceed *in forma pauperis* you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single motion. If you seek to challenge judgments entered by different judges or divisions either in the same district or in different districts, you must file separate motions as to each judgment.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the motion you file seeking relief from any judgment of conviction.

(7) When the motion is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is UNITED STATES DISTRICT COURT 1162 FEDERAL BLDG. HARRISBURG, PA. 17108

(8) Motions which do not conform to these instructions will be returned with a notation as to the deficiency.

MOTION

1. Name and location of court which entered the judgment of conviction under attack MIDDLE DISTRICT OF PA. U.S.D.C. HARRISBURG, PA.

2. Date of judgment of conviction APRIL 22, 1992

3. Length of sentence 274 months Sentencing Judge WILLIAM W. CALDWELL, J.

4. Nature of offense or offenses for which you were convicted 21:846 CONSPIRACY TO DISTRIBUTE COCAINE (RE: 21:841(a)(1)

5. What was your plea? (Check one)

   (a) Not guilty ( )

   (b) Guilty (X)

   (c) Nolo contendere ( )

If you entered a guilty plea to one count or indictment, and a not a guilty plea to another count or indictment, give details:

_____

_____

_____

6. Kind of trial: (check one)

   (a) Jury ( )

   (b) Judge only (X)

7. Did you testify at the trial? Yes ( ) No (X)

8. Did you appeal from the judgment of conviction? Yes ( ) No (X)

9. If you did appeal, answer the following:

   (a) Name of court NO APPEAL FILED BY COUNSEL

   (b) Result _____

   (c) Date of result _____

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court? Yes ( ) No (X)

11. If your answer to 10 was "yes," give the following information:

   (a) (1) Name of court N/A

   (2) Nature of proceeding

   _____

   (3) Grounds raised

   _____

   (4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

   (5) Result _____

   (6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding

_____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(5) Result _____

(6) Date of result _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court _____

(2) Nature of proceeding

_____

(3) Grounds raised

_____

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No ( )

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ( ) No ( )

(2) Second petition, etc. Yes ( ) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

ALTHOUGH REQUESTED, NO APPEAL FILED BY COUNSEL

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, *you should raise in this motion all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

If you select one or more of these grounds for relief, you must allege facts in support of the ground or grounds which you choose. Do no [sic] check any of the grounds listed below. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

NOTE: If Petitioner asserts denial of effective assistance of counsel (ground "i"), he *must* describe with particularity the factual basis for his claim (e.g., lawyer failed to raise insanity defense), *and* he must describe the prejudice allegedly suffered as a result of the denial of effective assistance of counsel (e.g., convicted of crime that Petitioner lacked the mental capacity to commit).

A. Ground one: INEFFECTIVENESS DURING PLEA

Supporting FACTS (tell your story *briefly* without citing cases or law): SEE: MOTION ATTACHED

B. Ground two: INEFFECTIVE ASSISTANCE OF COUNSEL DURING CRITICAL PHASES OF CRIMINAL PROCESS

Supporting FACTS (tell your story *briefly* without citing cases of law): SEE: MOTION ATTACHED

C. Ground three: PROCEDURAL DEFAULT

Supporting FACTS (tell your story *briefly* without citing cases or law): SEE: MOTION ATTACHED

D. Ground four: PETITIONER ENTITLED TO A SIGNIFICANTLY LESSER PERIOD OF INCARCERATION

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C and D were not previously presented, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: ALTHOUGH REQUESTED, NO APPEAL FILED BY COUNSEL

14. Do you have any petition or appeal now pending in any court as to the judgment under attack? Yes ( ) No (X)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing L. REX BICKLEY 121 SOUTH ST. HARRISBURG, PA.

(b) At arraignment and plea same as (a) above

(c) At trial _____

(d) At sentencing same as (a) above

(e) On appeal _____

(f) In any post-conviction proceeding REQUESTING APPOINTMENT OF COUNSEL MOTION ATTACHED

(g) On appeal from any adverse ruling in a post-conviction proceeding same as (g) above

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes ( ) No (X)

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (X)

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) And give date and length of sentence to be served in the future: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ( ) No ( )

Wherefore, movant prays that the court grant him all relief to which he may be entitled in this proceeding.

Executed at FCI SCHUYLKILL MINERSVILLE, PA.
City, County, State

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 12-6-96
(Date)

/s/ Illegible
Signature/of Movant

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Caption omitted in printing)

GOVERNMENT'S RESPONSE
TO DEFENDANT'S § 2255 MOTION

I. PROCEDURAL HISTORY

On January 6, 1992, Peguero pled guilty to Count I of his Indictment, conspiracy to distribute more than 5 kilos of cocaine in York, PA between March of 1989 and February of 1990. On April 22, 1992, Peguero was sentenced to 274 months incarceration to run consecutively to a New Jersey sentence for narcotics trafficking. No direct appeal was filed.

On December 10, 1996, the instant 28 U.S.C. § 2255 petition was filed. By Orders dated December 18, 1996 and January 3, 1997, the government was directed to file a Response by no later than February 6, 1997.

II. SUMMARY OF THE ALLEGATIONS

Peguero claims his attorney was ineffective because he did not fully explain his plea agreement to him before he signed it and because he did not file an appeal on his behalf as he directed. Peguero also claims the Court's three level enhancement for his managerial role in the offense was not supported by the evidence. Peguero also argues his sentence should be reduced because the government engaged in impermissible "fact bargaining" with his co-defendants.

III. COUNSEL'S ASSISTANCE WAS NOT INEFFECTIVE

A. Applicable Standards

The United States Supreme Court and the Third Circuit have articulated a two-pronged test for determining whether relief may be granted on claims of ineffective assistance of counsel. A petitioner must show: "(1) counsel made errors so serious that counsel's representations fell below an objective standard of reasonableness, and (2) such failure resulted in prejudice so as to deprive the petitioner of a fair trial, that is, a trial whose result is reliable. *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 295 (3d. Cir. 1991) (citing *Strickland v. Washington* 466 U.S. 668, 688 (1984). "Acts or omissions of counsel that are alleged not to have been the result of reasonable, professional judgement" must be identified and "the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside of the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690; *see Zettlemoyer*, 923 F.2d at 295. Furthermore, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable judgement." *Strickland* 466 U.S. at 690.

B. The Alleged Failure to Explain the Plea Agreement

Peguero claims his attorney was ineffective by not fully explaining the plea agreement he signed. Peguero

does not articulate what particular provision of the 31 paragraph agreement he did not fully comprehend.

The government was not privy to Peguero's discussions with counsel before he signed the agreement. However, the government does know that Peguero did not profess any lack of understanding at the time he entered his guilty plea. The Court conducted a lengthy and detailed guilty plea colloquy with Peguero. During the proceeding Peguero was advised of the essential terms of his agreement and the Court advised Peguero as to the maximum penalties he faced. When the Court inquired as to whether he understood these matters, he responded in the affirmative. When Peguero was asked whether he had been promised anything beyond that set forth in his plea agreement, he denied same.

The Plea Agreement itself contains Peguero's personal acknowledgment, directly above his signature, that he reviewed the agreement with his attorney and he understood its terms. The Acknowledgment provides:

> I have read this agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it.

See Attachment "A," p.12. Peguero's attorney also verified that he thoroughly reviewed the plea agreement with his client. Directly above his signature, counsel confirmed that he. . . .

> carefully reviewed every part of this agreement with the defendant. To my knowledge my client's decision to enter this agreement is an informed and voluntary one.

Attachment "A," p.13. Beyond the written verification provided by the plea agreement, the government believes a review of the guilty plea transcript will reveal Peguero orally confirmed he discussed the plea agreement with his attorney, that he fully understood it's implications, and that he agreed with its provisions.

As with any ineffective assistance of counsel claim, the petitioner must not only show counsel's performance was objectively unreasonable, but that it prejudiced him. *See Strickland*, at 690. Assuming *arguendo* that Peguero's counsel did not properly explain the plea agreement to him, Peguero has not articulated how he was actually prejudiced. Thus, Peguero fails to meet all of the *Strickland* standards.

C. The Alleged Failure To File An Appeal

That counsel did not file an appeal does not necessarily mean his performance was below Sixth Amendment standards or his client was prejudiced thereby. First of all, Peguero's allegation that he told his attorney to file an appeal is without substantiation. In a January 31, 1997, letter to undersigned counsel written in response to Peguero's allegations, Attorney Bickley not only confirms that Peguero never asked him to file an appeal, but that Peguero deliberately decided to forego an appeal in favor of cooperating with the government.

> After sentencing, I asked Mr. Peguero if he wished to appeal the sentence under these circumstances. He indicated that he did not. Rather, he believed that he stood a better chance of a reduced sentence by cooperating with the

> authorities and providing them information. I concurred.

See Attachment "B," p.1. Although Bickley continued to communicate with Peguero and his wife over the course of the next year or two, "the issue of appeal did not arise." *Id.*, p.2.[1]

More importantly, Peguero makes no showing an appeal would have been successful. Peguero offers no support for his claim that he could have successfully challenged his sentence on appeal. Indeed, an appeal of his sentence would have bordered on the frivolous. Peguero's attorney readily recognized this fact and communicated same to his client.

> In light of the substantial information provided by witness testimony in related matters, information provided by co-defendants who pled guilty, and other information obtained by the authorities, I informed Peguero that the likelihood that he would prevail at the time of sentencing or on appeal on the issues of the amount and his role in the conspiracy was minimal.

Id., p.1. Thus, Peguero's petition fails to meet the *Strickland*. standards.

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[1] Although Peguero did provide some sketchy information regarding narcotics trafficking to the DEA, his assistance was neither substantial assistance nor deserving of a Rule 35 reduction.

IV. THE MANAGERIAL ROLE ENHANCEMENT

Peguero contends his three level enhancement under U.S.S.G § 3B1.1(b) for being a manager or supervisor was unwarranted. Although he does not provide any new evidence nor articulate why any of the government's proof should not have been considered, Peguero baldly asserts there was insufficient evidence supporting this enhancement.

The Sentencing Guidelines provide for a two, three, or four level increase if the defendant had a supervisory or a managerial role in his offense. A three level increase is warranted . . .

> If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive . . . .

U.S.S.G. § 3B1.1 The Commentary to § 3B1.1 articulates the policy behind the adjustment.

> This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (*i.e.* the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. The adjustment is included primarily because of concerns about relative responsibility.

Factors to be considered are the exercise of decision making authority, the nature of participation in the offense, the recruitment of accomplices, a claimed right to a larger share of the proceeds, the degree of participation in planning or organizing the offense, and the degree of control

and authority exercised over others. Application Note 4, U.S.S.G. § 3 B1.1. To be a supervisor, there must be some degree of control over others involved in the commission of the offense. United *States v. DeGovanni* 1997 WL 1224, *2 (3d Cir., January 2, 1997). "A defendant's offense level may not be increased . . . in the absence of evidence that he or she managed or supervised someone else." United *States v. Fuentes*, 954 F.2d 151, 154 (3d Cir. 1992).

Peguero's conduct easily falls within these parameters. Peguero's cocaine distribution ring was extensive and involved far more than 5 participants. Four codefendants were prosecuted with Peguero for cocaine distribution; another was prosecuted locally. Peguero and his gir1firiend, Elizabeth Diaz, would travel weekly to New York City area to purchase large quantities of cocaine. Peguero then supplied smaller amounts to codefendants Robert Andino and Miguel Feliciano-Rosario, a/k/a/ "Pepe," who distributed the cocaine to others in the community. The details of Peguero's offense are set forth in the Presentence Report pages 2-4, attached hereto as Attachment "C." A cursory review confirms that the Court properly assessed a three level increase and that Peguero's petition lacks merit.

IV. THE CODEFENDANT WEIGHT STIPULATIONS

Citing former Attorney General Thornburgh's Memorandum of March 13, 1989, Peguero claims the government engaged in impermissible fact-bargaining regarding with his codefendants which resulted in their receiving lower sentences. Peguero claims due process demands he receive the same type of sentence.

Peguero is correct in stating Department of Justice Policy requires federal prosecutors to limit their negotiations to stipulations that accurately reflect each defendant's conduct. However, Peguero does not articulate how his codefendant's cocaine weight stipulations radically understated their roles or otherwise violated the policy. The government secured a stipulation from Peguero's counsel that his offense involved between 15 and 50 kilos because that was what the evidence proved. The same was true for Peguero's codefendants. Because their roles were not as aggravated as Peguero's, their stipulations necessarily entailed lower, albeit realistic, amounts. Thus, assuming *arguendo* that Peguero has standing to complain about another defendant's plea bargain, this argument also lacks merit.

V. CONCLUSION

Based on all of the above, the Court should summarily deny Peguero's § 2255 motion without a hearing.

Respectfully submitted,

DAVID M. BARASCH
UNITED STATES ATTORNEY

By: /s/ Kim Daniel
KIM DOUGLAS DANIEL
Assistant U. S. Attorney

Date: February 6, 1997

TO BE PROVIDED
ATTACHMENT A

ATTACHMENT B

LAW OFFICES
L. REX BICKLEY
121 SOUTH STREET
HARRISBURG, PENNSYLVANIA 17101

(717) 234-0577
FAX: (717) 234-7832

January 31, 1997

Kim Douglas Daniel
U. S. Department of Justice
Federal Building
Suite 217
228 Walnut St.
Harrisburg, PA 17108

Re: USA v. Manuel D. Peguero

Dear Kim:

I have reviewed Mr. Peguero's Motion and offer the following.

Before and at the time of sentencing, I indicated to Mr. Peguero that he faced a substantial jail term. I also informed him that he had the right to appeal but that appeals of these factual determinations were very difficult and often unsuccessful. In light of the substantial

information provided by witness testimony in related matters, information provided by co-defendants who had pled guilty, and other information obtained by the authorities, I informed Mr. Peguero that the likelihood that he would prevail at the time of sentencing or an appeal on the issues of the amount and his role in the conspiracy was minimal.

Prior to sentencing, you and the DEA had indicated an interest in information Mr. Peguero might have with respect to related and unrelated drug trafficking. Mr. Peguero expressed an interest in providing information to the authorities who, I believe, thought that Mr. Peguero might indeed have valuable information. You indicated that your office was interested in information Mr. Peguero might have and were willing to move for a departure in the event Mr. Peguero provided information of use to you or the authorities.

After sentencing, I asked Mr. Peguero if he wished to appeal the sentence under these circumstances. He indicated that he did not. Rather, he believed that he stood a better chance of a reduced sentence by cooperating with the authorities and providing them with information. I concurred.

Over the course of the next year or two, Mr. Peguero supplied me with information which I, in turn, turned over to you. At some point, I believe DEA agents did interview Mr. Peguero. Apparently, you determined that either the information was not credible or was not significant.

The information and correspondence I subsequently received from Mr. Peguero all involved either information

and names which he thought would gain him a reduction in sentence or, somewhat later on, he and his wife began to correspond with me with respect to whether I could do anything about his New Jersey sentence. In conversations with Mr. Peguero and in any correspondence I received from him, the issue of appeal did not arise.

Having said all of this, I believe Mr. Peguero to be a man of limited education who does not understand the English language very well. Additionally, he probably had no idea of the Federal Sentencing structure since his prior criminal record, although extensive, was on a County and State level. Although understandable within the Federal Sentencing Guidelines, this sentence seemed then and now altogether inappropriate. I can appreciate the extent to which he may not have fully comprehended the situation which he fould himself in at the time.

Sincerely,

/s/ L. Rex Bickley
L. Rex Bickley

LRB/sz

ATTACHMENT C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Caption omitted in printing)

PRAECIPE

TO: MARY E. D'ANDREA, CLERK

MADAM:

Attached please find the Government's Exhibit "A" which was omitted from the Government's Response to Defendant's §2255 Motion filed on February 6, 1997. Kindly attach same to the Response.

Respectfully submitted,

DAVID M. BARASCH
United States Attorney

BY: /s/ Kim Douglas Daniel
KIM DOUGLAS DANIEL
Assistant U.S. Attorney
P.O. Box 11754
Harrisburg, PA 17108

Dated: 2-12-97

CRIMINAL NO. 1:CR-90-097-01
CIVIL NO. 1:CV-96-2143

EXHIBIT "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CASE NO. I:CR-90-097-01
	:	(Judge Caldwell)
v.	:	
MANUEL D. PEGUERO	:	

PLEA AGREEMENT

(Filed Jan. 6, 1992)

The following plea agreement is entered into by and between the United States Attorney for the Middle District of Pennsylvania and the above-captioned defendant. Any reference to the Government in this agreement shall mean the Office of the United States Attorney for the Middle District of Pennsylvania.

The defendant, as well as counsel for both parties, understand that the United States Sentencing Commission Guidelines which took effect on November 1, 1987, will apply to the offense for which the defendant is pleading guilty, since those offenses were completed after the effective date of the Guidelines implementation.

1. The defendant agrees to plead guilty to Count I of the Indictment which charges the defendant with a violation of Title 21, United States Code, Section 846, Conspiracy to distribute in excess of 5 kilos of cocaine. The maximum penalty for the offense is imprisonment for a period no less than 10 years and a maximum of life

imprisonment and/or a fine of $4,000,000, a term of supervised release to be determined by the court, the costs of prosecution as well as an assessment in the amount of $50. At the time the guilty plea is entered, the defendant shall admit to the Court that the defendant is in fact guilty of the offense(s) charged in that count. After sentencing, the Government will move for dismissal of any remaining counts. The Government and the defendant agree that the defendant's personal involvement in this conspiracy to distribute cocaine was no less than 15 kilos and no more than 50 kilos of cocaine.

2. The defendant also understands that the court must impose at least a three-year term of supervised release in addition to any term of imprisonment, fine or assessment involving a violation of the Controlled Substances Act.

3. When this plea agreement is returned to the United States Attorney's Office for review by the United States Attorney, the defendant will provide a check representing the full amount of the special assessment(s) set forth in paragraph 1 as required by Title 18, United States Code, Section 3013. This check will be made payable to the Clerk of the United States District Court and will not be deposited unless the plea agreement is finally accepted by the United States Attorney and the assessment is imposed at sentencing. The failure to have such check supported by sufficient funds will be treated as a breach of this plea agreement and may result in additional criminal charges being filed.

4. The defendant understands that the Court must impose a fine pursuant to the Sentencing Reform Act of

1984. Failure to pay any fine imposed by the Court, in full, will be considered a breach of this plea agreement. Further, the defendant acknowledges that failure to pay the fine subjects the defendant to additional criminal violations and civil penalties pursuant to Title 18, United States Code, Section 3611, *et seq.*

5. The defendant agrees to forfeit to the United States of America any and all interests he may have in any property, including but not limited to cash, real estate, automobiles, stocks, bonds, jewelry, or other personal property, constituting or derived from any proceeds the defendant obtained, directly or indirectly, as a result of his participation in the offense set forth in paragraph 1 of this agreement, and any property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of such offense, including but not limited to automobiles and real estate. The defendant agrees to immediately surrender possession of any such property to the United States and to direct any third party that may have possession or control of such property to immediately surrender same to the United States.

6. The defendant agrees, as a part of this agreement, to submit to interviews by the United States Attorney's Office Financial Litigation Unit regarding the defendant's financial status and to complete and submit the attached financial statement, under oath, not later than two weeks after the date of this plea agreement. The defendant also agrees to provide copies of any and all financial statements, records and documents regarding any and all assets to the Financial Litigation Unit at the time of his submission of the financial statement.

7. The United States Attorney's Office for the Middle District of Pennsylvania agrees that it will not bring any other criminal charges against the defendant arising out of the defendant's involvement in the offense described above. However, nothing in this agreement will limit prosecution for criminal tax charges, if any, arising out of those offenses.

8. Counsel for the defendant has affirmatively indicated to the United States Attorney's Office that the defendant not only wishes to enter a plea of guilty, but clearly demonstrates a recognition and affirmative acceptance of responsibility as required by the sentencing guidelines. If the defendant can adequately demonstrate this recognition and affirmative acceptance of responsibility to the Court, the United States Attorney's office will recommend that the defendant receive a two-point reduction in the defendant's offense level for acceptance of responsibility. The failure of the Court to find that the defendant is entitled to this two-point reduction shall not be a basis to void this plea agreement without benefit of any reduction for acceptance of responsibility.

9. At the time of sentencing, the Government will make a recommendation that it considers appropriate based upon the nature and circumstances of the case and the defendant's participation in the offense, and specifically reserves the right to recommend a sentence up to and including the maximum sentence of imprisonment and/or a fine allowable, together with the cost of prosecution.

10. The defendant has agreed to cooperate with the Government. Upon completion of the cooperation, if the

Government believes the defendant has provided "substantial assistance" pursuant to Title 18, United States Code, Section 3553(e), the Government may in its discretion request the Court to depart below the guideline range when fixing a sentence for this defendant.

11. The defendant also understands that the Government will provide to the United States Probation Office all information in its possession which the Government deems relevant regarding the defendant's background, character, cooperation, if any, and involvement in this or other offenses.

12. The defendant understands that pursuant to the United States District Court for the Middle District of Pennsylvania "Policy for Guideline Sentencing" both the Government and defendant must communicate to the probation officer within fifteen (15) days after disclosure of the pre-sentence report any objections they may have as to material information, sentencing classifications, sentencing guideline ranges and policy statements contained on or omitted from the report. The defendant agrees to meet with the Government at least five (5) days prior to sentencing in a good faith attempt to resolve any substantive differences. If any issues remain unresolved, they shall be communicated to the probation officer for his inclusion on an addendum to the presentence report. The defendant understands that unresolved substantive objections will be decided by the court at the sentencing hearing where the standard of proof will be a preponderance of the evidence. Objections by the defendant to the presentence report or the Court's rulings, will not be grounds for withdrawal of a plea of guilty.

13. At the sentencing, the Government will be permitted to bring to the Court's attention, and the Court will be permitted to consider, all relevant information with respect to the defendant's background, character and conduct including the conduct that is the subject of the charges which the Government has agreed to dismiss, and the nature and extent of the defendant's cooperation, if any. The Government will be entitled to bring to the Court's attention and the Court will be entitled to consider any failure by the defendant to fulfill any obligation under this agreement.

14. The defendant understands that the Court is not a party to and is not bound by this agreement nor any recommendations made by the parties. Thus, the Court is free to impose upon the defendant any sentence up to and including the maximum sentence of imprisonment for life imprisonment and/or a fine of $4,000,000, a term of supervised release, the costs of prosecution and penalty assessments totalling $50.

15. If the Court imposes a sentence with which the defendant is dissatisfied, the defendant will not be permitted to withdraw any guilty plea for that reason alone, nor will the defendant be permitted to withdraw any pleas should the Court decline to follow any recommendations by any of the parties to this agreement.

16. The defendant agrees to cooperate fully with the Government. The defendant understands and agrees that complete and truthful cooperation is a material condition of this agreement. Cooperation shall include providing all information known to the defendant regarding any criminal activity, including but not limited to the offenses

described in this agreement. Cooperation will also include complying with all reasonable instructions from the Government, submitting to interviews by investigators and attorneys at such reasonable times and places to be determined by counsel for the Government and to testify fully and truthfully before any grand juries, hearings, trials, or any other proceedings where the defendant's testimony is deemed by the Government to be relevant. The defendant understands that such cooperation shall be provided to any state, local and federal law enforcement agencies designated by counsel for the Government. The Government agrees that any statements made by the defendant during the cooperation phase of this agreement shall not be used against the defendant in any subsequent prosecutions unless and until there is a determination by the Court that the defendant has breached this agreement. However, the Government will be free to use at sentencing in this case any of the statements and evidence provided by the defendant during the cooperation phase of the agreement.

The defendant waives and agrees to waive any rights under the Speedy Trial Act and understands and agrees that sentencing may be delayed until the cooperation phase has been completed so that at sentencing the Court will have the benefit of all relevant information.

17. The defendant agrees to act in an undercover capacity to the best of the defendant's ability and agrees to allow the authorities to monitor and tape record conversations, in accordance with Federal law, between the defendant and persons believed to be engaged in criminal conduct, and fully cooperate with the instructions of law enforcement authorities in such undercover activities.

18. The defendant agrees to submit to polygraph examinations by a polygrapher selected by the Government.

19. In the event the Government believes the defendant has failed to fulfill any obligations under this agreement, then the Government shall, in its discretion, have the option of petitioning the Court to be relieved of its obligations. Whether or not the defendant has completely fulfilled all of the obligations under this agreement shall be determined by the Court in an appropriate proceeding at which any disclosures and documents provided by the defendant shall be admissible and at which the Government shall be required to establish any breach by a preponderance of the evidence. In order to establish any breach by the defendant, the Government is entitled to rely on statements and evidence given by the defendant during the cooperation phase of this agreement.

20. The parties agree that at any court hearings held to determine whether the defendant has breached this agreement, the polygraph results and the polygrapher's conclusions and opinions shall be admissible. The parties also agree that such polygraph data shall be admissible at any sentencing hearings involving the defendant.

21. The defendant and the United States agree that in the event the Court concludes that the defendant has breached the agreement:

(a) The defendant will not be permitted to withdraw any guilty plea tendered under this agreement and agrees not to petition for withdrawal of any guilty plea;

(b) The United States will be free to make any recommendations to the Court regarding sentencing in this case;

(c) Any evidence or statements made by the defendant during the cooperation phase will be admissible at any trials or sentencings;

(d) The United States will be free to bring any other charges it has against the defendant.

22. Nothing in this agreement shall protect the defendant in any way from prosecution for any offense committed after the date of this agreement, including perjury, false declaration, or false statement, in violation of Title 18, United States Code, Section 1621, 1623, or 1001, or obstruction of justice, in violation of Title 18, United States Code, Section 1503, 1505, or 1510, should the defendant commit any of those offenses during the cooperation phase of this agreement. Should the defendant be charged with any offense alleged to have occurred after the date of this agreement, the information and documents disclosed to the United States during the course of the cooperation could be used against the defendant in any such prosecution.

23. The defendant agrees to interpose no objection to the United States transferring evidence or providing information concerning the defendant and/or this offense, to other state and federal agencies or other organizations, including, but not limited to the Internal Revenue Service, law enforcement agencies and licensing and regulatory agencies.

24. Nothing in this agreement shall limit the Internal Revenue Service in its collection of any taxes, interest

or penalties due from the defendant arising out of or related in any way to the offenses identified in this agreement.

25. The defendant agrees to interpose no objections to the entry of an order under Fed.R.Crim.P. 6(e) authorizing transfer to the Examination Division of the Internal Revenue Service of the defendant's documents, or documents of third persons, in possession of the Grand Jury, the United States Attorney or the Criminal Investigation Division of the Internal Revenue Service.

26. Nothing in this agreement shall restrict or limit the nature or content of the United States' motions or response to any motions filed on behalf of the defendant.

27. Nothing in this agreement shall bind any other federal, state or local enforcement agency.

28. The United States is entering into this Plea Agreement with the defendant because this disposition of the matter fairly and adequately addresses the gravity of the series of offenses from which the charges are drawn, as well as the defendant's role in such offenses, thereby serving the ends of justice.

29. This document states the complete and only Plea agreement between the United States Attorney for the Middle District of Pennsylvania and the defendant in this case, and is binding only on the parties to this agreement, supersedes all prior understandings, if any, whether written or oral, and cannot be modified other than in writing that is signed by all parties or on the record in Court. No other promises or inducements have been or will be made to the defendant in connection with

this case, nor have any predictions or threats been made in connection with this plea.

30. The original of this agreement must be signed by the defendant and defense counsel and received by the United States Attorney's Office on or before 5:00 p.m., January 2, 1992, otherwise the offer shall be deemed withdrawn.

31. None of the terms of this agreement shall be binding on the Office of the United States Attorney for the Middle District of Pennsylvania until signed by the defendant and defense counsel and until signed by the United States Attorney.

ACKNOWLEDGMENTS

I have read this agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it.

1/2/92 — Dated
/s/ Manuel Peguero
MANUEL D. PEGUERO
Defendant

I am the defendant's counsel. I have carefully reviewed every part of this agreement with the defendant. To my knowledge my client's decision to enter into this agreement is an informed and voluntary one.

1/2/92 — Date
/s/ L. Rex Bickley
L. REX BICKLEY, ESQUIRE
Counsel for Defendant

1/6/92 — Date
/s/ James J. West
JAMES J. WEST
United States Attorney

(KDD: nm)
(December 10, 1991/90R5100)

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Caption omitted in printing)

AMENDED PETITION FOR RELIEF UNDER 28 U.S.C. §2255

AND NOW comes the defendant, Manuel DeJesus Peguero, by his attorney Daniel I. Siegel of the Federal Public Defender's Office, and files this Amended Petition for Relief Under 28 U.S.C. §2255.

1. On December 10, 1996, Mr. Peguero filed a *pro se* petition for relief under 28 U.S.C. §2255, citing four grounds in support of his request for relief.

2. Mr. Peguero's *pro se* petition of December 10, 1996, is adopted by reference herein as if set forth in full.

GROUND FIVE

3. On January 6, 1992, Mr. Peguero appeared before this court for purposes of a guilty plea hearing, at which time he pled guilty to drug conspiracy in violation of 21 U.S.C. §846.

4. On April 22, 1992, Mr. Peguero appeared before this court for a sentencing hearing, at which time he received a sentence of 274 months imprisonment.

5. Transcripts of the guilty plea hearing and the sentencing hearing have been filed with the court.

6. As of the date of sentencing, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided that at the time of sentencing, "the court shall advise the defendant of any right to appeal the sentence."

7. The district court did not advise Mr. Peguero of his right to appeal the sentence at either the guilty plea hearing or the sentencing hearing.

8. Because the district court did not advise Mr. Peguero of his appellate rights, it is requested that the judgment of sentence be vacated and that the case be listed for resentencing.

Respectfully submitted,

Date: June 4, 1997

/s/ Daniel I. Seigel
DANIEL I. SIEGEL, ESQUIRE
Asst. Federal Public Defender
100 Chestnut Street, Suite 306
Harrisburg, PA 17101
Attorney for Manuel DeJesus Peguero
Attorney ID #38910

I declare under penalty of perjury that the foregoing is true and correct. Executed on 6-4-1997.

/s/ Manuel DeJesus Peguero
Manuel DeJesus Peguero

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(Caption omitted in printing)

TRANSCRIPT OF PROCEEDINGS
HEARING ON DEFENDANT'S MOTION

Before: Hon. William W. Caldwell, Judge

Date: June 10, 1997

Place: Courtroom No. 2 Federal Building Harrisburg, Pa.

COUNSEL PRESENT:

KIM D. DANIEL, Assistant U.S. Attorney
For – Government
DANIEL I. SIEGEL, Esquire_
For – Defendant

Monica L. Zamiska, RPR
Official Court Reporter

[p. 2] INDEX TO WITNESSES

INDEX TO EXHIBIT

[p. 3] MR. DANIEL: Your Honor, we are here this morning in the case of the United States of America v. Manuel Dejesus Peguero. Last year Mr. Peguero filed a motion under Title 28 of the United States Code, Section 2255, a habeas corpus petition, challenging the sentence he received, also attacking the voluntariness of his – and knowledge of the plea agreement which he signed which lead to the entry of his guilty plea. The government filed a response to that petition, and thereafter the Court directed a hearing to be held on two issues. One being whether or not his counsel had advised him of his right to appeal and whether he had voluntarily opted to waive filing a direct appeal from his sentence, and, secondly, whether or not his attorney had adequately advised him as to the nature and contents of his plea agreement. Today is the time and place scheduled for the hearing on the defendant's petition.

THE COURT: All right. Very well.

MR. SIEGEL: The defendant is prepared to proceed. I believe we would have the burden, so I would call Mr. Bickley as the first witness, and I would ask him to take the file with him to the stand please.

I would note for the record, Your Honor, the presence of Professor Jose Diaz, a Spanish interpreter.

REX BICKLEY, called as a witness, being duly sworn or affirmed, testified as follows:

[p. 4] THE CLERK: Would you state for the record your full name please.

THE WITNESS: My name is Rex Bickley.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. SIEGEL:

Q Mr. Bickley, were you appointed to represent Manuel D. Peguero in a criminal drug case before Judge Caldwell in 1991 and 1992?

A Yes.

Q Did you represent Mr. Peguero at his guilty plea hearing?

A Yes.

Q And did you represent Mr. Peguero at his sentencing?

A Yes.

Q Pursuant to my telephonic request to you did you bring with you to this courtroom today the documents and the files that you have in the case?

A Most of them, yes.

Q I'd like to begin by asking you some questions about the documents in the case. Do you have any notes, any memoranda, regarding your review of the plea agreement with Mr. Peguero; that is, notes that you made when you sat down and discussed it with him?

A Not specifically the plea agreement, the plea agreement [p. 5] within the context of his overall situation.

Q Did you meet with Mr. Peguero at a prison to review with him the plea agreement?

A No.

Q Did you –

A It's possible that I met with him at Dauphin County Prison, yes.

THE COURT: For the purpose of going over the plea agreement?

THE WITNESS: Yes. I guess my question is I don't know whether I met him at Dauphin County Prison or I met him in the marshal's lockup.

BY MR. SIEGEL:

Q Would it be fair to say that when you met him to review the plea agreement it was very close to the time that he entered the plea agreement?

A It probably was. It was at least on the day of the plea agreement or the change of plea, and it may have been the day I was initially appointed. It may have been, I'm not sure.

Q Do you have any notes or memoranda reflecting what was discussed between yourself and Mr. Peguero at the time the plea agreement was reviewed?

A I explained to him -

Q I think the question is do you have any notes of that meeting?

[p. 6] A It is possible I have notes of that, although I do not – honestly I don't know whether they're contemporaneous or not, but I have one sheet of notes which may be.

Q Now you're holding in your hand a piece of yellow legal paper. Is that correct?

A That's correct.

Q Is there a date on that piece of yellow legal paper?

A No.

Q So you don't know whether or not that piece of paper was in existence at the time you met with Mr. Peguero regarding the plea agreement. Is that correct?

A That's correct.

Q Do you have, other than that piece of paper, any handwritten notes say on the back of your file regarding your discussion on the plea agreement?

A I have notes. I don't know whether, again, they're contemporaneous. In other words, there is no date. There is no formal memorandum.

Q Do you have any documents in your file that you believe represent a contemporaneous assessment by you of the guideline calculations in this case; that is, guidelines that you would have discussed with Mr. Peguero prior to his entry of the plea agreement, do you have any papers?

A I believe I'm holding one right now.

Q Okay, why don't you tell us what's on that piece of [p. 7] paper?

A I have at the top conspiracy to distribute 15 to 50 kilos. My note that one potential issue was his role in the

offense. The issue is 4 points, up or down, and the guideline offense score of 32 to 36, 210 to 324 months. And then various and sundry other issues which he may have raised dealing basically with another co-defendant's role in the offense.

Q Perhaps you could read to us from that piece of paper these other matters.

A Whether he was working for Pepe, who was another co-defendant. Who paid for the mobile. Pepe's use of a home or apartment in York. A phone, a car. Who went to New York.

Was Pepe involved? And then some reference that I am unable to read.

Q Is there any memo or document or writing in your file indicating that you warned Mr. Peguero before the entry of his guilty plea of the potential of a career offender sentence?

A No.

Q Continuing with the questions regarding documents at this point, is there any memorandum or notation in your file regarding a personal meeting that you had with Mr. Peguero to review the presentence report?

A I sent – well, let me find it. At the time Mr. Peguero I believe was incarcerated I believe in New Jersey. On [p. 8] February 25 I sent him a letter.

THE COURT: What year?

THE WITNESS: Of 1992.

A I sent him a letter asking him to review the presentence report and I dealt with some other issues.

BY MR. SIEGEL:

Q Was the letter in English or Spanish?

A It was in English.

Q You sent him a letter in English?

A Yes.

Q Please continue.

A He responded to that letter in Spanish, and I had it translated.

Q And what was in that letter which he sent back to you?

A Basically it addressed issues of his role in the offense and his relationship with Pepe and other defendants and co-defendants.

Q Do you know who wrote the letter in Spanish? Do you know whether it was Mr. Peguero who wrote that letter?

A Other than it being signed by Manuel Peguero, no, I don't.

Q Other than those letters is there any memorandum or notation in your file reflecting a personal meeting to review Mr. Peguero's presentence report; that is, a meeting between you and Mr. Peguero in person?

[p. 9] A The only other references I have with respect to that question involved I was court appointed at

that time. At the end of a case I would file a little voucher to which was attached worksheets, and on my worksheets there are references to meetings with Mr. Peguero.

Q But the question again is do you have any documents, memos, notations in your records indicating that you personally met with Mr. Peguero to review his presentence report?

A Other than this?

Q Yes.

A No.

Q Do you recall whether or not you did personally meet with Mr. Peguero to review his presentence report?

A Yes, I did.

Q Did you personally meet with him?

A Yes.

Q Do you remember where and when that was?

A It would have probably been either at Dauphin County or at the marshal's lockup on the day he was sentenced.

Q Getting back to the documentary questions, is there any memo or notation in your file reflecting a warning of appellate rights following the sentencing hearing?

A Written, no.

Q Now going back to the review of the plea agreement [p. 10] before the entry of the guilty plea, are you

able to remember independently what advice you gave to Mr. Peguero regarding that guilty plea?

A I explained to Mr. Peguero that once he signed the agreement it would be difficult, possible but difficult, to reverse, that I wanted him to be certain of this. That although I was uncertain as to the specific sentence he would receive, it was going to be substantial. At the time and throughout the whole proceeding really the real issue, my issue and his issue, was substantial assistance. I was approached by the U.S. Attorney's Office who believed that Mr. Peguero had information, and they were willing to move for a downward departure should that information prove useful. Mr. Peguero was very interested in that at that time and for a year or two thereafter.

Q In those discussions did you warn Mr. Peguero that he might be classified as a career offender?

A I don't remember.

Q Do you remember making any inquiry to determine whether Mr. Peguero would be classified as a career offender?

A I don't have any specific recollection of that. In my sense when I met with Mr. Daniel, we discussed that along with all the other issues with respect to sentencing, possible guideline ranges.

Q Are you saying then that you did – are you saying then [p. 11] that you were aware of the possibility of career offender sentencing either before or after the guilty plea?

A I believe I was but I'm not saying it with certainty.

Q Are you able to say with certainty whether or not you told Mr. Peguero about the potential career offender sentence?

A I believe I did but I'm not certain. I told Mr. Peguero he was facing significant jail time.

Q Did you explain to him the minimum and maximum sentences?

A You mean the ranges?

Q Did you explain to him the statutory minimum and maximum sentences?

A Once again I believe I probably did, but I don't – I can't say that for certain.

Q Did you explain to Mr. Peguero your calculation of the potential guideline sentence?

A I think I probably told him that depending on the 4 point – depending on his role in the offense, depending on the criminal history calculation, that he was looking at anywhere between, well, as my notes indicate, potentially up to 20 years or more.

Q Did I – in your notes is there a reference to 210 months?

A Yes.

[p. 12] Q And what calculation is that?

A I believe that's a calculation of 32.

THE COURT: Do you – you're speaking in shorthand here. Offense level are you talking about?

THE WITNESS: Yes, offense level.

THE COURT: Offense level.

BY MR. SIEGEL:

Q Of course, the actual guideline range was much higher than a 210 month sentence would encompass. Would that be right?

A That's correct.

Q The 210 month calculation would be a calculation without the career offender. Is that right?

A I'm not sure.

Q But your notes do reflect that in discussing – that in your calculation of the guideline range that the lower end of the guideline range was the 210 months. Is that right?

A My notes reflect 210 to 324.

Q And those are the undated notes?

A Yes.

Q Did you following the sentencing hearing, on the day of the sentencing hearing, have any discussion with Mr. Peguero regarding his appellate rights?

A Yes, I informed him that he had the right to appeal, and I would be willing to do that. I would be court appointed to [p. 13] continue my representation. Once again he was – his focus was substantial assistance

and cooperating, as it had been, with the authorities and his hope that his sentence would be substantially, well, reduced to some extent because of his substantial assistance.

Q And what was Mr. Peguero's response to that?

A He had indicated that he wanted to cooperate. He wanted to meet with the authorities and give them information, that he did not want me to take an appeal, and I concurred with that.

Q Did you understand based on that discussion that Mr. Peguero was waiving his right to appeal?

A Yes.

Q Did you confirm that in writing to Mr. Peguero during the 10 day period within which to file the notice of appeal?

A I did not.

Q Did you make a notation on your file that Mr. Peguero was waiving his appellate rights?

A If I did, I can't find it.

Q Did you dictate a memo to your file indicating that Mr. Peguero was waiving his appellate rights?

A No.

Q On January 30, 1997 you wrote a letter to Mr. Daniel, the prosecutor, which he attached to his brief as Exhibit B.

I want to read to you a sentence from that and then ask you a [p. 14] question about it. You said quote: I can

appreciate the extent to which he may not have fully comprehended the situation which he found himself in at the time. Period end quote. Could you explain what you meant by that?

A Well, I think I did partly in the letter. Not only with respect to Mr. Peguero, but some of the other criminal defendants with whom I have had some contact often are men of limited education, sometimes while they can speak some English, do not speak it very competently. They have had perhaps extensive state or county criminal experience but no federal experience, and they simply don't understand the situation they find themselves in in terms of what really is going to happen, the substantial sentences they receive, and it's possible that Mr. Peguero didn't fully appreciate exactly where he was.

Q Did Mr. Peguero have a problem with the English language?

A He could speak and write English, but I knew that we needed an interpreter. In other words, he wasn't sufficiently conversation – he didn't understand it well enough that I could deal with him by myself. So I did have an interpreter I believe every time I met with him.

Q And that was at your request to have the interpreter?

A I think so, yeah. Certainly – perhaps not at the first, at the initial proceeding, but thereafter it was clear [p. 15] that we should have an interpreter.

Q Did you explain to Mr. Peguero at any time prior to the plea agreement the mandatory minimum sentence of 10 years imprisonment?

A I think I might have told him that there was a mandatory minimum, but in his situation it might very well turn out to be meaningless in the sense that the guidelines would produce a much higher sentence.

Q Well, are you saying that you are not sure whether or not you told him about the 10 year mandatory minimum?

A That would fall in the same category as my answer to some of your other questions. I'm not absolutely certain, but I believe I did. I mean, the thrust of my response to him was he was looking at a significant sentence, and he consistently indicated to me that he had information which the authorities could use. Mr. Daniel indicated that they were prepared to reduce his sentence with that information.

MR. SIEGEL: I have no further questions of this witness. Excuse me.

BY MR. SIEGEL:

Q Do you have any notes in your file indicating that you actually did meet with Mr. Peguero at the Dauphin County Prison?

A The only notes, once again, that I have, are notes associated with the worksheets to which I attached – that [p. 16] were attached to the voucher.

THE COURT: Well, that would be easy to figure out then, what dates was he in the Dauphin County Prison and what year.

BY MR. SIEGEL:

Q Well, do your worksheets reflect that you visited the defendant in jail?

A My notes reflect that I had a conference with Mr. Peguero on November 19. That was either at Dauphin County jail or was at the marshal's lockup.

Q Does that reflect the time spent on that conference?

A Close to two hours.

Q Any other conferences?

A I met with Mr. Peguero on January 6. I met – now there were telephone calls between Mr. Peguero and myself. And I also met with Mr. Peguero at the date of sentencing on April 22, but there were maybe 1, 2, 3, 4, 5, five or six telephone calls between Mr. Peguero and myself, Mr. Peguero's girlfriend and myself or my notes indicate a friend.

Q Just to be clear, on January 6, 1992 the record reflects that there was a guilty plea hearing.

A That's correct.

Q Could you indicate for the record the dates of any meetings you had with Mr. Peguero on or before January 6, 1992?

[p. 17] A November 19, 1991 and January 6, 1991.

Q Now the November 19, –

THE COURT: '92 you mean.

THE WITNESS: Or '92, excuse me.

BY MR. SIEGEL:

Q The November 19, 1991 meeting, where was that?

A Once again I don't recall whether it was at Dauphin County Prison or marshal's lockup or York County, wherever he would have been.

Q Did you have the plea agreement on November 19, 1991?

A I believe I probably did, although I don't have any notation that that occurred. I think I had it on November 19 because I believe he had it on November 19.

MR. SIEGEL: I would note, Your Honor, for the record that the plea agreement marked as Exhibit A of the government's brief, paragraph 13 reflects that the written plea agreement was generated on December 10, 1991.

THE COURT: What do you mean generated?

MR. SIEGEL: The bottom of the plea agreement after the signature pages contained a parenthesis KDD:NM end of parentheses, which – we're talking about Exhibit A of the government's attachments to its brief. At the end of the plea agreement there is a reflection of the secretary's initials –

THE COURT: I see it.

MR. SIEGEL: – plus the date December 10, 1991 –

[p. 18] THE COURT: Right.

MR. SIEGEL: – and a number following that. I believe that would reflect the date that the plea agreement would have been typed up.

THE COURT: But not necessarily – of course, it wasn't signed on that date.

MR. SIEGEL: Correct, it was signed after.

THE COURT: And I think Mr. Bickley's testimony was on when did you meet with him?

MR. BICKLEY: November 19 I initially met with him. The only reason I thought that it may have been generated then was I note on the plea agreement that he signed it I think on the 2nd.

BY MR. SIEGEL:

Q Of January?

A Of January, which would have been several days before, and it's possible, although I don't remember, that we had met at some other time, but somehow he got the plea agreement, and that's – I don't recall or my records don't reflect how he got the plea agreement.

Q I believe that in preparing for this case you had to ask for several continuances because you couldn't actually get to visit Mr. Peguero. Is that correct?

A That's correct. Well, I think that the – I moved for the enlargement of time to file. I don't know that I – I [p. 19] might have asked for continuances, but I don't know that I asked for continuances. I think I just asked for an extension of time within which to file motions.

Q Well, that would be reflected in the file. Right?

A Yes.

MR. SIEGEL: I have no further questions, Your Honor.

THE COURT: All right, Mr. Daniel.

CROSS EXAMINATION

BY MR. DANIEL:

Q Yes, Mr. Bickley, do you recall the date you were appointed to represent Mr. Peguero?

A November 19, I believe.

Q Of 1991?

A That's correct.

Q And, sir, can you describe for the Court communications that you had with my office and with me personally regarding Mr. Peguero's case shortly after your appointment?

A Well, we had conversations about the case, his co-defendants, possible sentencing guidelines, and the most important aspect of it was your interest in his cooperation.

Q Did we also discuss the strength of the government's case against Mr. Peguero?

A Yes.

Q Did I also provide you with extensive discovery in the [p. 20] case?

A Yes.

MR. DANIEL: May I approach the witness, Your Honor?

THE COURT: Certainly.

BY MR. DANIEL:

Q I want to show you a letter, Mr. Bickley. Can you tell me what that is?

A This is a letter dated December 19 that you directed to me.

THE COURT: Would you also put the year in please.

THE WITNESS: I'm sorry, December 19, 1991.

A You were providing me with *Jencks* material, other pieces of evidence with respect to your case against Mr. Peguero.

BY MR. DANIEL:

Q That *Jencks* material being statements of other witnesses?

A Yes.

Q There were in fact a prior trial, related trial prior to Mr. Peguero, your representation of Mr. Peguero. Is that correct?

A Yes, that's correct.

Q I believe his name was mentioned Pepe, Feliciano Rosario, was that his name?

A Yes.

[p. 21] THE INTERPRETER: I'm sorry, Your Honor, I cannot hear the last statement.

MR. DANIEL: I'll repeat the question.

BY MR. DANIEL:

Q You were aware, were you not, Mr. Bickley, that there had been a trial before Judge Caldwell on a related case?

A Yes.

Q I believe one of the defendants being the person who has been identified earlier this morning as Pepe?

A That's correct.

Q A gentleman by the name of Mr. Feliciano Rosario. Were you provided with statements and testimony from that trial?

A I believe I was, yes.

Q Materials that you were provided by that cover letter of December 19, how extensive were they? I don't want you to go through each one, but how many individually numbered pieces of testimony and other evidence was provided to you?

A Thirty-nine.

Q Now when you received these voluminous materials, sir, what did you do with them?

A Well, I reviewed them, and in my conversations with Mr. Peguero I informed him that, you know, he certainly had the right to go to trial, but the government's case against him was very significant. I also told him acquittals in the middle district are difficult in this situation. You know, I [p. 22] had no confidence that I could gain an acquittal of the charges with respect to Mr. Peguero.

Q As of that time –

A Now I –

Q I'm sorry, I don't mean to cut you off. Please continue.

A He never indicated he wanted to take this matter to trial. I mean, he wanted this matter over with really, that was my recollection, and he felt absolutely certain he had information which would be useful to you guys.

Q Okay, at the time of his initial indictment Mr. Peguero was incarcerated in the state of New Jersey. Isn't that correct?

A That's correct.

Q And then some point, I believe around the time of your appointment for him and his first appearance before this court at his arraignment, he was then incarcerated here in the Harrisburg area. Is that correct?

A Well, he was brought to the Harrisburg area, that's correct.

Q All right.

A I'm not sure – I don't recall where he was lodged.

Q And you told us that your notes indicate that you met with Mr. Peguero on November 19 of 1991 somewhere here in the Harrisburg area?

[p. 23] A Yes.

Q And your notes also indicate that you spoke to him by telephone on I believe you said five to six occasions thereafter?

A Well now, that would have – yes.

Q Would that be between the time of your first meeting with him and the time he entered his guilty plea?

A Yes.

Q I note, Mr. Bickley, that the plea agreement was executed both by yourself and Mr. Peguero on January 2, 1992.

Q Is that correct?

A Yes.

Q But that he did not enter his plea before the Court until January 6, 1992, four days later?

A That's correct.

Q Do you recall where it was that Mr. Peguero and yourself signed that plea agreement?

A I don't recall.

Q Could it have been at the Dauphin County Prison?

A Yes.

Q Do you recall reviewing the plea agreement in detail with Mr. Peguero prior to his signing it?

A Yes.

Q What were the essential terms of the plea agreement, sir, as you recall them?

[p. 24] A That he would plead to the conspiracy count, which would generate a substantial sentence, but

there was also a provision for a downward departure should he provide information satisfactory to the U.S. Attorney's Office.

Q Did the plea agreement also contain a stipulation with respect to the weight of the cocaine for which Mr. Peguero would be held accountable?

A Yes.

Q And what was that stipulation, sir?

A I believe it was – well, let me –

THE COURT: Well, you can ask a leading question.

A In excess of 5 kilograms.

BY MR. DANIEL:

Q Well, let me show you the plea agreement, sir. Directing your attention to the latter part of the first paragraph and going on to the next page.

A Yes.

Q Is it a stipulation that his offense involved no less than 15 kilos but no more than 50 kilos?

A That's correct.

Q Did you communicate that specific stipulation in the plea agreement to Mr. Peguero?

A Yes.

Q Did the plea agreement also include a representation that the government was – well, let me strike that. The plea [p. 25] agreement also set forth the statutory

minimums and statutory maximums to the offense for which he was pleading guilty, and again I direct your attention to paragraph 1.

A Yes.

Q And what were the statutory minimums and maximums?

A Ten years to a maximum of life imprisonment.

Q Did you convey that provision to Mr. Peguero prior to his execution of it?

A Yes.

Q He understood that?

A Well, I thought he understood it, yes.

Q Was an interpreter present at that time?

Q Yes. Well, my recollection is that an interpreter was with Mr. Peguero and myself every time I met with him.

Q Did you also – does the plea agreement rather also contain a provision that allows the government to recommend the maximum term of statutory imprisonment, and I believe it's paragraph 9?

A Well, I see that here as paragraph 9. I don't recall specifically telling Mr. Peguero that.

Q Does the plea agreement also contain a provision, and I direct your attention to the very last paragraph, that other than the terms that are set forth in that plea agreement that no other promises or assurances have been made to the defendant?

[p. 26] A Yes.

Q I direct your attention to paragraph No. 29.

A Yes.

Q Did you point that out to Mr. Peguero?

A I don't recall.

Q Did you ever assure Mr. Peguero at any point prior to the time of the entry of his guilty plea that he was going to receive a 10 year sentence?

A No.

Q I believe you told us your term was that he was going to receive a significant sentence. Is that correct?

A I reiterated to him that he would receive a significant sentence, serious jail time.

Q You told us that your notes indicate a guideline range of 210 to 324 months.

A That's what they indicate, yeah.

Q Do you recall whether you told Mr. Peguero that was your calculation and your best estimate of what his range was going to be?

A Yes.

Q And would that have been prior to the entry of his plea?

A I believe it was.

Q The acknowledgment section of the plea agreement, sir, on the bottom of page 12 where it states that I

have read this agreement carefully, reviewed every part of it with my [p. 27] attorney. I fully understand it, and I voluntarily agree to it, and then purports to be signed January 2, '92 and the purported signature of Manuel Peguero. Did Mr. Peguero sign that in your presence?

A I'm not sure.

Q The next page states: I am defendant's counsel. I have carefully reviewed every part of this agreement with the defendant. To my knowledge my client's decision to enter into this agreement is an informed and voluntary one. It's also dated January 2 and purports to be your signature. Is that your signature?

A Yes, it is.

Q Do you recall signing this plea agreement?

A Well, not specifically, no, but I'm sure I did.

Q Do you recall whether it was in his presence when you signed it or at the same time?

A I don't recall.

Q Sir, you also were present at the time Mr. Peguero entered his guilty plea. Isn't that correct?

A That's correct.

Q Here in court before Judge Caldwell?

A Yes.

Q Sir, have you reviewed a transcript of that guilty plea proceeding?

A Yes.

[p. 28] Q Is it not true that at the outset of that hearing the, government, and by that meaning myself, advised the Court and Mr. Peguero the government's calculation of Mr. Peguero's likely guideline range was 235 to 293 months?

A Yes.

Q And is it also not true that the Court itself advised Mr. Peguero prior to the acceptance of that plea that his likely sentence was in the range of 20 years?

A I believe, although I'm looking for the transcripts now.

Q I'll direct your attention to page 10 of what purports to be the transcript.

THE COURT: Which transcript are you referring to?

MR. DANIEL: The transcript from the guilty plea hearing, Your Honor, of January 6, '92.

A Yes.

BY MR. DANIEL:

Q There was during the course of that guilty plea hearing a brief recess. At any time, sir, do you recall during that recess or at any other time did Mr. Peguero ever express to you his surprise hearing that his guideline range was in excess of 20 years?

A No.

Q At any time did he express any concern that he might be sentenced to more than 10 years?

A No.

[p. 29] Q At any time did Mr. Peguero express to you a lack of comprehension, understanding as to any term of his plea agreement?

A No.

Q Sir, I'd like to move on to the appellate rights issue if you will. Mr. Peguero entered his plea on January 6, and he was sentenced I believe in April, April 22 of 1992. You told us about the presentence report that you received and that I believe you told us that you reviewed that report with Mr. Peguero. Is that correct?

A On the day of sentencing I believe and possibly in telephone conversations, although I'm not sure of that.

Q My recollection, sir, is that there was only one objection filed to the presentence report, and am I correct on that?

A That's correct.

Q That was to the 4 level enhancement for aggravated role in the offense?

A That's correct.

Q And at the beginning of the sentencing hearing on April 22 you presented Mr. Peguero's testimony on behalf of that objection. Is that correct?

A That's correct.

Q Mr. Peguero testified to the extent of his activities in the conspiracy. Isn't that correct?

[p. 30] A Yes.

Q And then at one point after he testified there was another recess. Is that correct?

A That's correct.

Q And during that recess you and I reached a stipulation. Is that correct?

A That's correct.

Q That instead of a 4 level enhancement, you would agree to a 3 level enhancement for role in the offense?

A Yes.

Q Did you discuss that stipulation with Mr. Peguero during that recess prior to announcing the stipulation in court?

A Yes, I did.

Q What was his response to that stipulation?

A He found that acceptable.

Q He agreed to it?

A Yes.

Q He didn't have any problem with it?

A Well, he didn't utter anything to me contrary to that.

Q Okay, did you explain to him why you thought the three level stipulation was appropriate?

A Well, I explained to him that I thought that he was facing a substantial period of time in jail. That if – I think the Court was prepared to look at prior testimony.

That he was not going to prevail unless we worked something out.

[p. 31] Q Were there any other issues, sir, besides the aggravated role in the offense that Mr. Peguero disagreed with with respect to the sentencing issues?

A At the time, no.

Q That was the only issue?

A Yes.

Q All right, you told us, you testified, that after he was sentenced you asked Mr. Peguero if he wanted to appeal. Is that correct?

A Yeah. Well, I informed him he had the right to appeal.

Q Did you tell him how many days he had in which to file his notice of appeal?

A I told him I would have to know immediately whether he wanted me to appeal.

Q And where was that, sir, when you told him?

A It would have been either prior to the hearing or it would have been immediately after the sentencing hearing.

Q Either prior to the hearing or immediately after?

A Yes.

Q And what did he tell you when you told him that?

A He said he didn't want to appeal. He indicated he wanted to provide information to – he wanted this all

over, and he wanted to provide information to the government to reduce his sentence.

Q In fact Mr. Peguero had met with the government [p. 32] investigators on January 6, 1992 following his entry of his plea. Isn't that correct?

A I know that he had met with the authorities, with either DEA or FBI representatives, sometime around that period.

Q That was the day he met with Mr. Miller from the DEA. Is that correct?

A That's my recollection or at least that's what I was told.

Q And it was in that meeting, the first meeting with Mr. Miller, that Mr. Peguero denied knowing who Mr. DeOleo was. Isn't that correct?

A Well, I believe that's the case, yes.

Q In fact he admitted to that during the sentencing hearing. He admitted having met with Mr. Miller on January 6, and he admitted having denied to Mr. Miller that he didn't know who Mr. DeOleo was, his supplier?

A From reading the transcript of the sentencing hearing I believe that's correct.

Q So he lied to Mr. Miller at the time of his initial debriefing. Isn't that correct?

A Well, I don't know.

Q After he was sentenced and after he told you that he didn't want to take an appeal, at any point did he raise to you the subject of an appeal or pursuing an appeal?

A No. I received five or six letters from him immediately [p. 33] afterwards and for the next year that indicated that he simply wanted to provide information to the authorities, and I turned those over to you, and you indicated that you would take a look at them.

Q He provided information to you in some of his letters regarding his drug dealing activities?

A Well, in the first five letters I believe he provided information to me with respect to – well, information he hoped that would gain him a reduction in sentence. Later on his letters dealt with whether I could help him with the consecutive nature of – well, with respect to his New Jersey sentence, and then finally letters I received from him or his wife were administrative, how could I get copies of transcripts and that sort of thing.

Q Did you ever receive letters from me, sir, to the effect that I had referred your letters and his information to the DEA for their information?

A I received two or three letters from you.

Q When was the first time that you heard from any source that Mr. Peguero was claiming that he had directed you to file an appeal and that you had failed to have done so?

A Earlier this year when I received a letter from you.

Q And that was my cover letter that enclosed a copy of his 2255 petition?

A Yes.

[p. 34] Q Nearly four years after his sentencing. Is that correct?

A Yes.

Q He never complained to you in a letter –

A No, all of his letters –

Q – that you had failed to file an appeal as he had ordered you to do?

A No, his letters dealt with information he wanted me to pass on to you.

Q He never called you complaining about your having failed to follow his instructions?

A No.

Q The first time you heard about it is when I sent you a copy of the petition?

A Yes. Now prior to that, maybe sometime in 1995, I believe, I received either a telephone call or maybe a letter from either Mr. Peguero or his wife asking for transcripts of the sentencing proceedings, and I directed him to the clerk's office.

MR. DANIEL: I have no other questions.

REDIRECT EXAMINATION

BY MR. SIEGEL:

Q Mr. Bickley, you testified regarding the signing of the plea agreement on January 2, 1992. Do you recall that?

A I recall my testimony, yes.

[p. 35] Q Okay. Now you have your billing sheets up with you at the stand. Correct?

A Yes.

Q Do those billing sheets reflect any billing for services on January 2, 1992?

A No. Well, let me look again. No.

Q Now your notes do reflect billing for a personal meeting with Mr. Peguero on November 19, 1991, the date of your appointment. Is that correct?

A That's correct.

Q And your notes also reflect billing for your meeting with Mr. Peguero on January 6, 1992, the date of the guilty plea hearing. Is that correct?

A That's correct.

Q Do you have any explanation for why your notes would not reflect another meeting which occurred on January 2, 1992?

A It may have been that I met with him and just didn't note it. It may have been, I don't know.

Q Now the plea agreement is in English. Correct?

A Yes.

Q It is a long document?

A Yes.

Q Somewhat complex for the layman?

A To more than a layman.

Q When you met with Mr. Peguero on January 2, 1992, what [p. 36] was the name of the interpreter who was with you?

A It may have been a Mr. – may have been a Mr. Torres or Miss Torres.

Q And do your documents reflect any billing from an interpreter on January 2, 1992?

A I don't have any such billings.

Q Did you submit to the court a request for expert services so that you could hire an interpreter to come with you to meet with Mr. Peguero on January 2, 1992?

A Well, as I mentioned to you over the telephone, I don't know whether I – the procedure at the time was that I would have done that or they would have done that themselves, I'm not sure.

Q So you think that the interpreter might have submitted his or her own bill to the court for the interpreting services on January 2, 1992. Is that correct?

A That's correct. Now it may be the case that I did it and it's in notes that are with other government discovery materials that I just didn't find.

Q So if there was an interpreter there, that interpreter's bill might be reflected in court records. Is that what you're saying?

A It might have been, yes.

Q But you have no notes of any meeting with Mr. Peguero on January 2, 1992?

[p. 37] A I do not.

Q Do you recollect how long the meeting took place on January 2, 1992?

A Well, as I testified just moments ago, my notes don't reflect anything.

Q Do you remember – let me rephrase this. Do you think you would remember you had been present in a room and an interpreted [sic] had translated to Mr. Peguero the entire plea agreement in this case? Do you think you'd remember that sort of thing?

A I think I would have remembered that.

Q Okay, do you have a recollection of an interpreter meeting with you and Mr. Peguero, reading to Mr. Peguero verbatim the entire plea agreement?

A I do not. As I said, it's possible that I would have met with him and we would have reviewed it. It's also possible – again, I don't even recall where he was, whether he was in Dauphin County or York County throughout that period from November to the date of his plea or he was back in New Jersey and he would have had the availability of an interpreter there, I'm not – I don't know.

Q Now you testified regarding five telephone conversations that you had with Mr. Peguero between the time of your appointment on November 19, 1991 and the guilty plea hearing on January 6, 1992. Is that correct?

[p. 38] A That's correct.

Q Now do your records reflect that those were telephone conversations between you and Mr. Peguero personally?

A My notes indicate that one was a telephone conversation with his girlfriend, one was a telephone conversation with his friend and the others would have been with Mr. Peguero.

Q So there were three telephone conversations between yourself and Mr. Peguero. Is that right?

A I believe.

Q Could you please indicate for the record the dates of those telephone conversations and the duration of those telephone conversations.

A December 11, 1991, 10 minutes. December 13, 1991, 10 minutes. December 13, 1991, 10 minutes.

Q In your office do you use the time keeping system that uses 10 minute increments?

A In my office I – any telephone call is .10.

Q Would it be fair to say that the smallest chunk of time that you bill for is 10 minutes?

A .10, that's correct.

Q So these conversations could have been less than 10 minutes?

A Could have been less, could have been more.

Q Did you have an interpreter on the line when you had these three conversations with Mr. Peguero listed at 10 [p. 39] minutes each?

A I did not at my end. Whether there was an interpreter at his end, I don't recall.

Q He was calling you from prison. Is that right?

A I'm not sure whether he was calling me or I was calling him. It is probably more likely that he was calling me.

Q You indicated that you received discovery materials from Mr. Daniel. Is that correct?

A Yes.

Q And I believe Mr. Daniel described them as voluminous. Would that be fair?

A Yes.

Q Did you send copies of those discovery materials to Mr. Peguero?

A No.

Q Did you meet with him personally at sometime between November 19, 1991 and January 6, 1992 to review them with Mr. Peguero?

A I don't recall.

Q You mean you think you might have?

A I think I might have, yes.

Q But that wouldn't be reflected on your billing records?

A It is not.

Q Did you travel to New Jersey to meet with him in prison there?

[p. 40] A No. No.

Q Do you speak Spanish?

A Very little.

Q In the three conversations with Mr. Peguero which you billed for 10 minutes did you try to use some of your Spanish to converse with him?

A None. No, I wouldn't do that, not conversationally. I can read a little bit but –

Q Would it be fair to say that in reviewing anything important with Mr. Peguero that you would want the presence of an interpreter based on your understanding of his knowledge of the English language?

A Yes.

MR. SIEGEL: I have no further questions.

THE COURT: Okay, is that all?

MR. DANIEL: Nothing, Your Honor.

THE COURT: Thank you, Mr. Bickley.

MR. SIEGEL: Your Honor, we call Manuel D. Peguero.

THE COURT: Have the defendant bring those papers up here.

MANUEL DEJESUS PEGUERO, called as a witness, being duly sworn or affirmed, testified as follows:

(The asterisk indicates the defendant answering through the interpreter Professor Jose Diaz.)

THE CLERK: Would you state your full name for the [p. 41] record please.

THE WITNESS: Manuel, M-a-n-u-e-l, Dejesus, D-e-j-e-s-u-s, Peguero, P-e-g-u-e-r-o.

DIRECT EXAMINATION

BY MR. SIEGEL:

Q Mr. Peguero, prior to the entry of your guilty plea did you have any discussion with your attorney, Mr. Bickley?

A *The first time that I went to court we met in a small room, and beginning that day he always told me I will be given 10 years, for me to call him to let him know.

Q The first meeting that you referred to, was that the first day you were brought to federal court here in Harrisburg?

A *Yeah, in the courtroom itself.

Q Did you have occasion to personally meet with Mr. Bickley again?

A *I'm sorry.

Q Did you again personally meet with Mr. Bickley at sometime in the following months?

A *No. I call on the phone, and I said I want to plead guilty, I want the 10 years. I was in CC New York at the time.

Q Could you please tell us what prisons you were in between November 1991 and January 6, 1992?

A *The marshals picked me up in November from New Jersey [p. 42] State Prison, then I was presented to the magistrate, then they took me to York County Prison – Union County Prison in Leesburg.

THE COURT: Lewisburg.

THE WITNESS: *Lewisburg.

BY MR. SIEGEL:

Q And where from there?

A *They took me back to CC, NCC New York.

Q New York or New Jersey?

A *NCC New York.

Q And where did you go from there?

A *They brought me back again.

Q Do you know what prison they brought you to?

A *To the same one, York County Prison.

Q Did Mr. Bickley visit you when you were in the Union County Prison?

A *No.

Q Did Mr. Bickley visit you when you were in the York County Prison?

A *No.

Q Did Mr. Bickley visit you in any New Jersey prison?

A *No.

Q Did Mr. Bickley visit you in any New York prison?

A *No.

Q Do you remember the day that you signed the plea [p. 43] agreement?

A *I know that it was at the beginning of January.

Q Okay, who was present when you signed the plea agreement?

A *He brought some gentleman interpreter.

Q How long did you meet with Mr. Bickley when you signed the plea agreement?

A *Five, 10 minutes.

Q What was the – could you describe for the Judge exactly what you remember happening and exactly what was said on the day that you signed the plea agreement?

A *He told me I'm looking at 10 years, and that is a substantial amount of time, and he told me that if I cooperate, I will get less time.

Q Was he using the interpreter when you signed the plea agreement?

A *Yes, he was using him, but the plea agreement was never read to me. It was never read to me.

Q Did Mr. Bickley summarize the plea agreement for you?

A *No.

Q What did Mr. Bickley tell you what was in that plea agreement?

A *He told me not to worry, that I will get 10 time, that is a substantial amount of time – 10 years, I'm sorry – that is a substantial amount of time, 10 years.

[p. 44] Q After you – did your attorney advise you to plead guilty?

A *Yes, he advised me.

Q After you pled guilty on January 6, 1992 when was the next time you saw your attorney?

A *Three or four months later, the day of the sentencing.

Q Had you communicated with Mr. Bickley on the telephone?

A *Yeah, once, and I spoke to him about 30 seconds because my English would not – I had no English to talk to him. Would not come out he says.

Q Did there come a time when you received a copy of the presentence report?

A *Yes.

Q Were you able to read the presentence report yourself?

A *I could not read it. I believe the 10 years that he had mentioned, I looked at it, but I could not understand it. I looked at it.

Q Did anyone translate for you the presentence report?

A *No. Where I was, I was living alone in a room. I couldn't get out.

Q Did you show your presentence report to any other prisoner?

A *As far as I can remember, no, as far as I can remember. Did you send to Mr. Bickley a letter in Spanish?

A *I don't remember but it could have been.

[p. 45] Q Do you remember whether you personally had written a letter or whether you would have asked some other inmate for some assistance?

A *If I can see the letter, I can tell you whether I wrote it or not.

Q Did you meet with Mr. Bickley at the courthouse on January 6, 1992, the day of the guilty plea hearing?

A *Yes.

Q Did you meet with him on that day before the hearing began?

A *Yes, he went upstairs to see me.

Q Could you please describe in the best detail you can everything you remember about that conversation with Mr. Bickley.

A *Our conversation was a very fast one, and he repeated again through an interpreter that I will be getting 10 years. Then I asked him will I serve the time concurrently, and he said I'll find out, and I'll let you know today.

Q Do you remember the sentencing hearing?

A *Yes, I remember.

Q Do you remember what sentence you got?

A *Yes.

Q What sentence did you receive?

A *Two hundred and seventy-four months consecutive to the sentence in New Jersey.

[p. 46] Q Was that what you had expected to receive?

A *No, I received a shock in my heart when I heard that.

Q Did you tell that to Mr. Bickley after the hearing was

A *I didn't see him, he left.

Q Did you discuss with Mr. Bickley your right to file an appeal?

A *Yes, and I sent him a letter also.

Q Let me back up. On the date of the sentencing hearing did you discuss with Mr. Bickley your right to file an appeal?

MR. DANIEL: Objection, Your Honor, that's been asked and answered.

THE COURT: Well, there may be a little confusion here about whether that occurred that day or not, so we'll allow it.

THE INTERPRETER: Would you like to repeat the question, I can't do it.

BY MR. SIEGEL:

Q On the date of the sentencing hearing did you discuss with Mr. Bickley your right to file an appeal?

A *At the moment I was sentenced I told him right away, the moment of the sentence.

Q What did you tell him?

A *I want to appeal the sentencing, and I told him in English clearly.

[p. 47] Q Did you repeat those instructions verbally or in writing at any time in the next 10 days?

A *In Union County Prison a fellow there wrote me this letter. He's pointing out the letter he has in front of him.

Q Okay, and did you send a letter to Mr. Bickley?

A *Yes.

Q What was the date of your letter to Mr. Bickley?

A *April 29, '92. 1992.

Q In your letter of April 29, 1992 did you ask Mr. Bickley to file an appeal?

A *Yes.

Q Did anyone explain to you on January 6, 1992 that you only had 10 days in which to file an appeal?

A *No.

Q Before the time that you entered your plea of guilty did you ever hear the phrase career offender?

A *No.

Q Did Mr. Bickley inform you that you might be sentenced as a career offender?

A *No.

Q Before the time that you entered your guilty plea did Mr. Bickley review with you your sentencing guidelines?

A *No.

Q Did – before you entered your guilty plea did Mr. Bickley tell you what sentencing guidelines were?

[p. 48] A *I have never heard that expression, sentencing guidelines.

Q You've testified that you believe that Mr. Bickley promised you a 10 year sentence. Is that right?

A *Yes.

Q If you had gone to the guilty plea hearing and if the judge had asked you whether anyone had made any promise to you regarding your sentence, what would you have answered to that question?

A *Yes, I would have said that, that he had promised me 10 years.

Q If the judge had answered your question and told you that you were mistaken, that the sentence was going to be much higher than 10 years, that the promise was not binding, would you have still entered your guilty plea?

A *At that time I don't know because I was confused and disoriented.

Q Is it possible that you would have changed your decision to plead guilty if someone had explained to you that the promise you understood from Mr. Bickley was not binding or was mistaken, could that have changed your mind about pleading guilty?

A *Oh, yes, I would have changed, I think so.

MR. SIEGEL: I have no further questions.

THE COURT: Let's take a short recess please, then [p. 49] we'll have cross examination.

(A recess began at 10:50 a.m. and the case continued at 11:00 a.m.)

(Manuel Dejesus Peguero continued as the witness.)

CROSS EXAMINATION

BY MR. DANIEL:

Q Mr. Peguero, you told us that from the beginning you were assured by Mr. Bickley that you were going to receive a 10 year sentence. Is that correct?

A *Yes.

Q And I believe you also testified that he never went through the plea agreement with you paragraph by paragraph?

A *Yes.

Q Is your signature on this plea agreement, sir?

A *Yes.

Q Where did you sign it?

A *Right here I signed it.

Q You mean in this courtroom?

A *Yeah, upstairs he says in the bullpen, meaning the holding cell.

Q But it was here in this building?

A *Yes.

Q What day did you sign it?

A *I do know that it was at the beginning of January.

Q Was it the same day that you pled guilty, sir, that you [p. 50] came into court and told the judge that you were guilty?

A *I think so. I think so. I think so.

Q Mr. Peguero, I'm going to direct your attention to the signature page of that plea agreement. Is that your signature?

A *Yes.

Q To the left of your signature is a date line, and there is a handwritten entry there that says January 2, '92. Whose handwriting is that?

A *This one on the right side is mine. The one is – this is not mine.

Q That's not your handwriting?

A *That's not my handwriting. The one on the right side is my handwriting. The one on the left, no.

Q To be clear, I'm asking you about the handwriting for the date.

A *Yes.

Q Whose handwriting is that?

A *This one on the left, that's not mine.

Q Whose is it?

A *I don't know.

Q The next page, also prepare the handwriting – purports to be the handwriting of Mr. Bickley as the signature. Did he sign it?

A *I don't remember, I don't remember, but I do know that [p. 51] I signed here, pointing to the other one.

Q It's also dated January 2, '92. Whose handwriting is that?

A *That is not my writing, my handwriting.

Q Do you know whose it is?

A *No.

Q You didn't plead guilty on January 2, did you, 1992?

A *I know that it was at the beginning of January, but I don't know when.

Q It was January 6. Isn't that correct?

A *Yes, when I was in court here.

Q Okay, could you have signed this plea agreement four days earlier on January 2?

A *Could be. Could be.

Q Where would that have been, sir?

A *If it occurred, it was here. Here is where I signed, I am certain of that.

Q Your trial wasn't scheduled until January 13. Isn't that correct?

A *I remember something like that.

Q You didn't have any – you hadn't filed any pre-trial motions. Isn't that correct?

A *No, I don't know what the attorney did. I don't know what he did.

Q There wouldn't have been any reason for you to be here [p. 52] in the courtroom on January 2 or in this building on January 2, is there?

A *Yeah, I don't remember this very clearly. I was brought here, and from here they took me to the county.

Q To a county prison?

A *I don't remember if it was – I know that on the 31st I was taken out of NCC New York.

Q The 31st of what month?

A *December.

Q And you were brought to a prison in the Harrisburg area. Isn't that correct?

A *I'm not sure if I was brought to Union County, York or to Dauphin.

Q Right, but it was somewhere here in the area?

A *Yes, I think so, yes.

Q And that was at the request of Mr. Bickley, wasn't it, because you were scheduled for trial in two weeks, and he wanted you here to get ready for trial? Isn't that correct?

A *Yes, but before that I had already pleaded guilty by phone.

Q Well, by that you mean you didn't tell the judge that you were guilty by phone, do you?

A *I told that to my representative, my attorney.

Q Mr. Bickley?

A *On December 11 1 called him.

[p. 53] Q You wanted to plead guilty early?

A *He told me 10 years and I accepted, and somebody told me they're going to give you more than 10 years, that's what you're going to get.

Q But my point is, sir, isn't it true that Mr. Bickley came to the prison, wherever it was that you were housed?

A *He never came to the prison.

Q Came to the prison and met with you on January 2?

A *He never saw me in prison, never, I assure you that. In fact the judge asked me if he had gone to see me in prison, and I told him, no, at one time, sometime.

Q You weren't in court – you were in this courtroom only on two occasions, is that correct, prior to today?

A *Yeah, but I came here once and I did not see the judge. I think it was that day, January 2. I am not very sure.

Q I take it back, it was at least three occasions. You were here for your arraignment. That was the very first time you were here. Correct?

A *Yes.

Q You came here for your guilty plea, and you were here for sentencing?

A *And as I said before, I'm repeating to you, I came here once and I did not see the judge.

Q What did you do on that occasion?

[p. 54] A *I don't know. They brought me from Union County, York to here, and from here they took me to Dauphin County.

Q Didn't you meet with Mr. Bickley that day?

A *Right here.

Q When you say right here, do you mean in the courtroom or in the building?

A *In the holding cell upstairs.

Q Could that have been January 2?

A *It could have been.

Q Is that when you could have signed the plea agreement, on that day?

A *When you what?

Q Could that have been the date when you signed your plea agreement?

A *Could have been. Could have been.

Q And at the time you signed the plea agreement did he explain it to you?

A *He never read to me what the agreement said.

Q Then why did you sign it, Mr. Peguero?

A *Because before I came here I was told that I would get a sentence of 10 years, and then the judge – and the judge told me – I'm sorry, the attorney told me I will get 10 years, and that's what I got, 10 years, and I believed in him.

Q Okay, well, let's start from the beginning. There is nothing in this plea agreement that says you're going to get [p. 55] 10 years, is there?

A *I – the first time that I read that agreement was about November or December of last year, the very first time that I read that plea agreement.

Q Sir, my question is, is there anything in this plea agreement that says you're going to get 10 years?

A *When I read it seven – seven months ago, I didn't see it.

THE COURT: I think the agreement speaks for itself.

MR. DANIEL: I think it does, Your Honor.

BY MR. DANIEL:

Q In fact isn't it true, Mr. Peguero, that the potential sentence that you could receive under the terms of this plea agreement is no less than 10 years and as much as life imprisonment?

A *I'm sorry, I didn't hear you.

Q Isn't it true that the agreement says that your potential sentence would be no less than 10 years and up to life imprisonment?

A *Yes.

Q Isn't it also true, sir, that when you came before Judge Caldwell in this courtroom on January 6 I told you in everyone's presence that your guideline range was 235 to 293 months?

A *I don't recall. I was confused and disoriented.

[p. 56] Q Why were you confused and disoriented?

A *I was nervous. I was nervous during those days. I was taken from one prison to the other and I was nervous. From one prison to the other, I was nervous.

Q Were you ill, sir?

A *No, I was not sick but nerves are worse.

Q Had you taken any medication prior to your entering that plea that morning?

A *No, no, what I did was I did not take any medication that day.

Q Okay, you had the benefit of an interpreter that day, didn't you?

A *Yes.

Q In fact it may have been Professor Diaz. Isn't that correct?

A *No, it was not him.

Q Wasn't it Professor Diaz? Did you understand the things that were being said to you that day, sir?

A *Most of it.

Q Do you remember Judge Caldwell asking you questions?

A *Many times.

Q Okay, and again I'm talking now about the time you entered your plea on January 6. Do you recall Judge Caldwell asking you whether you had consulted with Mr. Bickley about your decision to change your plea from innocent to guilty?

[p. 57] A *Yeah, I don't recall that very well, but I think he asked me something like that.

Q Do you recall telling Judge Caldwell that, yes, I did, Your Honor?

A *Yes, because I was promised 10 years.

Q And you took an oath, didn't you, sir, before you answered those questions?

A *I think so. I'm not very certain about that.

Q You took an oath to tell the truth, do you remember that, raising your hand, swearing to tell the truth?

THE COURT: Well, the record shows that Mr. Peguero was sworn.

BY MR. DANIEL:

Q Do you also recall Judge Caldwell asking you whether Mr. Bickley had fully informed you of your rights as far as you know?

A *I don't remember.

Q Do you recall Judge Caldwell asking you whether you were satisfied with Mr. Bickley's services as your attorney?

A *Yes, he told me that I was going to get 10 years.

Q Do you also recall Judge Caldwell asking you whether you agreed that your involvement in the conspiracy involved no less than 15 kilos but not more than 50 kilos of cocaine?

A *I remember.

Q And do you recall telling Judge Caldwell that you agreed [p. 58] with that?

A *I remember. I remember.

Q Do you recall Judge Caldwell asking you whether Mr. Bickley had explained to you the penalties that you were facing in the case?

A *I don't remember that.

Q And that the penalties were largely controlled by the quantity of drugs involved?

A *I don't remember.

Q Do you recall Judge Caldwell asking you whether Mr. Bickley had explained the sentencing guidelines to you?

A *As far as I remember, I never heard that phrase, the sentencing guidelines.

Q Well, do you recall telling Judge Caldwell in response to that particular question that, yes, Your Honor, it was explained to me?

A *I don't remember.

Q Do you also recall the Court, Judge Caldwell, telling you that the government, that I, had calculated that your sentence would be in the range of 20 years and upwards?

A *I was never told that.

Q Mr. Peguero, I'm going to show you what purports to be a transcript of your guilty plea on January 6, 1992. I'm going to direct your attention now to the bottom of page 9, and I'm going to ask Professor Diaz to read to you that portion of the [p. 59] transcript beginning on line 25, and I'll ask Professor Diaz to read that to you in Spanish verbatim.

A (The interpreter read to the defendant.)

Q Now having seen that, sir, do you remember this?

A *When I – I want you to know that when I was sentenced in the state, I heard about 15, 20, and here I did not pay that much attention to what was going on. I believed in my attorney. That's why I was not putting so much attention in what I was being told. I was confused and disoriented. I tell you I was confused and disoriented. I was bad, bad shape.

Q So it's your testimony that you either didn't hear or didn't comprehend what Judge Caldwell was telling you about your sentence?

A *I was confused. Sometimes when you hear some things and you cannot comprehend them.

Q But that wasn't your answer, was it?

A *I never – I never responded that. I had in my mind the 10 years.

Q Your answer is he understands that.

A *I told you why, because I was confused.

Q So it's your testimony today, just I want to understand you, that you didn't say that?

MR. SIEGEL: Objection, Your Honor. The transcript doesn't reflect a statement by the defendant, the transcript [p. 60] reflects a statement by the interpreter page 10, line 10. The defendant colon asterisk, he understands comma yes.

THE COURT: I understand that.

MR. SIEGEL: Yes, Your Honor, thank you.

BY MR. DANIEL:

Q My question, sir, is it your testimony here today that you didn't tell the interpreter that you understood that?

A *I want you to know I did not remember. I do not remember.

Q You told us on your direct examination that when you were sentenced on April 28, 1992 –

THE COURT: 22nd.

MR. DANIEL: I'm sorry, Your Honor.

THE COURT: Did you say April 22nd?

MR. DANIEL: I believe it is April 28, Your Honor.

THE COURT: Not according to the transcript.

MR. DANIEL: 22nd, yes, Your Honor, I'm sorry.

THE COURT: I want to keep the record straight.

BY MR. DANIEL:

Q When you were sentenced to 270 some months, you testified you were shocked to your heart.

A *I don't know if you heard the scream or the shout that I gave.

Q You mean at the time you heard Judge Caldwell's sentence –

[p. 61] A *Yes.

Q – you screamed?

A *Yeah, I acted – I did not expect that.

Q Did you say anything?

A *I was left dumb. I only told – and I told the attorney can you appeal, and he told me go over there, they are waiting for you.

Q Well, you said, you told us you were shocked to your heart. Did you say anything at all or say just wait a minute, what's going on here? I'm supposed to get a 10 year sentence.

A *I was left dumb.

Q You didn't say a word, did you?

A *Nothing, nothing, I was left – I was struck dumb.

Q In fact, sir, you haven't complained about your sentence for more than 5 years?

A *No, since I arrived at Schuylkill I am trying to take care of an appeal. I did not have any money to buy the transcript until I began to work in the Unicor.

Q Sir, –

A *I asked for it to be given to me for free but it was denied.

Q You were sentenced to 274 months, I believe it is?

A *Yes.

Q On April 22, 1992. The first time that you complained [p. 62] to the Court about that sentence being other than 10 years was December of 1996. Isn't that correct?

A *Formally, yes. I don't know if you recall that my mother wrote the letter to the judge explaining him the same thing some 4 years ago.

Q Your mother wrote a letter to Judge Caldwell 4 years ago?

A *Yes.

Q Saying that you should have gotten a 10 year sentence?

A *Yes.

Q Do you have a copy of that letter with you?

A *I lost my copy. When I was being transferred from one place to the other, I lost them.

Q Did you write any letter to Judge Caldwell complaining about the deal that you didn't get?

A *I don't have it very clear, but I think my wife, my mother and also myself wrote him.

Q That's what I'm asking you, I'm asking you about what you did. Did you write any letters to Judge Caldwell complaining about not getting your 10 year deal?

A *I don't remember very clearly. See, my wife speaks English, and I would complain to her.

Q Did you write any letters to me about not getting your 10 year deal?

A *I don't remember very clearly. I don't remember.

[p. 63] Q In fact you didn't even write any letters to your attorney about your not getting your 10 year deal, did you?

A *My wife would call him and complain to him.

Q Mr. Peguero, you told us that you were shocked to your heart that you got sentenced to 274 months.

A *Not only me but anyone who is sentenced to that much will receive a shock.

Q And you're telling us that you can't ever remember if you wrote a letter to the judge or to the prosecutor or even to your own attorney?

A *I don't – no, I don't recall that very clear. I would complain to my wife, and I would break down crying. I would break down crying.

Q Mr. Peguero, have you signed any letters recently that you didn't send?

A *All my letters I signed.

Q Are there any letters that you signed recently in the last 6 months that you didn't send?

A *I don't remember.

Q I want to show you, Mr. Peguero, a letter that you told us about in your direct exam, a letter dated April 29, 1992.

THE COURT: What's the date?

MR. DANIEL: April 29, 1992.

THE COURT: I thought you asked a question about the last 6 months.

[p. 64] MR. DANIEL: I have asked him whether he signed any letters within the last 6 months that he didn't send, Your Honor.

A *That's my signature. I signed that.

BY MR. DANIEL:

Q You signed that?

A *And he said before that the letter was written to him by a white fellow.

Q Question, when did you sign that?

A *That was 5 years ago, more than 5 years ago.

Q That's a letter in English. Correct?

A *That letter was prepared for me by this white fellow in Union County jail.

Q Question, sir, is the letter in English?

A *Yes, yes.

Q Okay, who is it addressed to?

A *To the attorney.

Q Who?

A *Mr. Bickley.

Q Mr. Bickley, and is it fair to say that in that letter you're complaining to Mr. Bickley about not taking an appeal or you're directing him to take an appeal? Isn't that correct?

A *As far as I can remember, I explained to this white guy my situation, and then he said I'm going to prepare a letter [p. 65] for you. He give it to his wife to prepare it and then I sign it. He give – and then I sign it and said keep that copy for yourself. I found this copy 5, 6 months ago. My wife had it.

Q Did you mail it?

A *The wife of the fellow who wrote the letter sent it.

Q Was it sent through the mail to Mr. Bickley in April of '92?

A *When I go from here, I go to Dauphin County. I go to – did you understand that?

Q No.

A *After I was sentenced I was taken to Dauphin County jail, and there I found some people that were became my friends, my colleagues, my partners, and they told me come here, I'll help you, and I'll write you this letter, and they prepared the letter.

Q Sir, my question is did you cause the letter to be mailed on or about the date that appears on it?

A *Yes.

Q You caused it to be placed in the mail sometime in April of '92 or thereabouts?

A *The wife of the white guy put it in the mail.

Q You didn't draft that letter or sign it within the last 6 months?

A *No, I did not do that.

Q Is this the only letter that you wrote to Mr. Bickley [p. 66] about taking an appeal?

A *Well, that one – that one and, as I said, by telephone and I told you before. And also the moment I was sentenced I was overwrought or I was overworked.

Q Is that the only letter that you sent to Mr. Bickley?

A *From there on I think that if I ever wrote him any letter, it was a different thing.

Q Not about taking your appeal?

A *That is the only one that I sent.

Q About taking an appeal?

A *Yes.

Q You told us in direct, your direct testimony, that you didn't know anything about having 10 days to file an appeal. Is that correct?

A *No, this white guy prepare this for me. I knew nothing. He said I'm going to prepare this for you, but I knew nothing.

THE COURT: I want to interject. Tell Mr. Peguero that this is his hearing on his petition, and his answers to the questions must be responsive. He is digressing.

THE WITNESS: *Okay, sorry.

BY MR. DANIEL:

Q Isn't it true, sir, that you told Mr. Siegel on your direct examination that at the time you were sentenced you didn't know anything about having to take an appeal within 10 [p. 67] days?

A *Precisely, I did not know anything. He knew it.

Q Doesn't your letter say it is my understanding – I should say quote: It is my understanding according to what the judge said that it must be filed within 10 days?

A *I want you to – yeah, I want you to understand that these are not my words. These are the words of the person who prepared the letter.

THE COURT: But the question was is that what the letter says?

THE WITNESS: *Yes, it is.

THE COURT: Now your attorney will ask you some more questions if that's important.

THE WITNESS: *Thank you. Okay.

THE COURT: Is that letter part of the record?

MR. DANIEL: Pardon?

THE COURT: Is that letter part of the record?

MR. DANIEL: No, Your Honor, it was identified by the defense, but I'm told they are not offering it as an exhibit.

MR. SIEGEL: That is correct, Your Honor, I'm not offering that letter as an exhibit, I'm relying solely on Mr. Peguero's testimony.

MR. DANIEL: But, Your Honor, the government would offer it as an exhibit. We ask that it be marked as [p. 68] Government's No. 1.

BY MR. DANIEL:

Q Sir, where have you been incarcerated since April 22 of 1992?

A *I was – remember I was here for two days, then they took me to Union County jail where I lasted there 2 weeks. Two or 3 weeks, I don't remember clearly.

Q Where did you go after that?

A *To NCC. NCC or SCI McKean.

Q How long have you been at McKean, how long were you at McKean?

A *I think I was there for about 3 months.

Q Where did you go then?

A *Then I went back to the state prison.

Q What state?

A *New Jersey state prison in Trenton.

Q How long were you there?

A *I think 5 or 6 months. I am not sure.

Q Then where did you go?

A *Then I went to another prison. I went to Riverfront State Prison. I was there only for 2 days. And I spent 6 months in Newark State Prison. There I was 6 months locked up. And then I went to South State in '93. I tried to do something there but nobody knew.

Q Are you still serving your New Jersey state sentence at [p. 69] this time?

A *No, I finished March 18, 1994.

Q Where did you go then?

A *I went to Elizabeth, New Jersey. I spent there 6 weeks in a federal/county, federal/county jail.

Q And where did you go after that?

A *Then I went to Schuylkill.

Q How long have you been – are you still at Schuylkill now?

A *Yes.

Q How long have you been at Schuykill [sic]?

A *Thirty-eight, 39 months.

Q And it was at Schuylkill where you filed this 2255 petition in December of 1996?

A *Yes.

Q Did anyone help you file this petition, sir?

A *Of course, yes.

Q Who?

A *He's called "the teacher" and I don't know. I don't his name for sure.

Q Is he an inmate or a guard or –

A *Yes, he's an inmate.

Q Do you know whether he's a lawyer?

A *No, I don't think so.

Q But, in any event, this was the very first time in this [p. 70] petition that you allege in any legal document that you didn't get the 10 years you had been promised?

A *Yes.

Q And it is also the very first time that you have alleged in any legal document that you instructed Mr. Bickley to take an appeal but he failed to do so?

A *Yes.

MR. DANIEL: I have no other questions.

THE COURT: Any redirect?

MR. SIEGEL: No redirect, Your Honor.

THE COURT: Thank you, Mr. Peguero.

THE WITNESS: *Excuse me, –

THE COURT: That's all, sir. You may go back and talk to Mr. Siegel. Please leave the stand.

Mr. Siegel, I'll let you consult with your client there, I don't know what he wanted to say, but do you have any other witnesses?

MR. SIEGEL: No, Your Honor.

THE COURT: All right. Do you, Mr. Daniel?

MR. DANIEL: Yes, Your Honor, very briefly.

(Mr. Siegel consulted with the defendant through the interpreter off the record.)

MR. SIEGEL: We have nothing further, Your Honor.

THE COURT: Okay, Mr. Daniel, do you have any rebuttal?

[p. 71] MR. DANIEL: Yes, Your Honor, we would offer Mr Bickley.

(Rex Bickley was recalled as a witness.)

DIRECT EXAMINATION

BY MR. DANIEL:

Q Mr. Bickley, I want to show you what's marked as Government No. 1, a letter reportedly dated April 29,

1992 from Mr. Peguero to you. Have you ever seen that letter prior to today, sir?

A No.

Q Have you ever had any conversation about that letter with anyone prior to coming into this courtroom today?

A No.

Q Neither Mr. Peguero nor Mr. Siegel discussed that letter with you?

A No.

MR. DANIEL: I have no other questions.

MR. SIEGEL: No further questions, Your Honor.

THE COURT: All right, thank you, Mr. Bickley.

THE WITNESS: Thank you, Your Honor.

THE COURT: I'm prepared I think to make a disposition of this case on the basis of the testimony I heard today and the other matters that have been filed. Do any of you – do either of you wish to file any post-hearing matters?

[p. 72] MR. DANIEL: Not by the government, Your Honor.

MR. SIEGEL: I'm satisfied with the record, Your Honor.

THE COURT: Okay, very well. If necessary, if I feel it is necessary, I'll have it transcribed. Sitting here right now I'm not sure what I'm going to do. Okay, we'll adjourn. Thank you very much.

(The proceedings concluded.)

I hereby certify that the proceedings and evidence of the court are contained fully and accurately in the notes taken by me on the hearing on the motion to vacate the within cause and that this is a correct transcript of the same.

/s/ Monica L. Zamiska
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

GOVERNMENT'S EVIDENTIARY HEARING
EXHIBIT NO. 1

L. REX BICKLEY, ESQ.
121 SOUTH STREET
HARRISBURG, PA. 17101

APRIL 29, 1992

RE: U.S. vs. MANUEL D. PEGUERO

DEAR MR. BICKLEY,

I AM WRITING TO YOU WITH REGARDS TO MY SENTENCE, LAST WEEK. I DO NOT UNDERSTAND WHAT HAPPENED. YOU TOLD ME THAT IF I PLED GUILTY, THAT I WOULD BE SENTENCED TO A MAXIMUM OF 10 YEARS, ONLY.

I ALSO DON'T UNDERSTAND WHY YOU WOULDN'T SEE ME PRIOR TO THE SENTENCING HEARING. AS I INFORMED YOU IN COURT, I AM ONCE AGAIN WRITING TO ASK YOU TO FILE MY DIRECT APPEAL. IT IS MY UNDERSTANDING, ACCORDING TO WHAT THE JUDGE SAID, THAT IT MUST BE FILED WITHIN (10) TEN DAYS. PLEASE INSURE THAT YOU COMPLY WITH THE RULES AND THE COURT.

I WILL ALSO CONSIDER WHAT YOU EXPLAINED TO ME ABOUT ME POSSIBLY COOPERATING, BUT I AM STILL CONFUSED BY THE ENTENCING [sic] HEARING AND THINGS BEING DIFFERENT THAN WHAT YOU PREVIOUSLY TOLD ME. PLEASE SEND TO ME A COPY OF ANYTHING THAT YOU FILE WITH

THE COURT, AND KEEP ME INFORMED. AS I TOLD YOU, IN COURT, I WANT TO APPEAL – THE SENTENCE, MANAGERIAL STATUS, ETC.

VERY TRUELY [sic] YOURS,

/s/ Manuel Peguero
MANUEL D. PEGUERO

LEWISBURG, PA.

cc; file

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	CRIMINAL ACTION NO. 1:CR-90-97-01
vs.	:	CIVIL ACTION NO. 1:CV-96-2143
MANUEL D. PEGUERO,	:	
Defendant	:	

MEMORANDUM

I. Introduction.

The defendant, Manuel Peguero, filed a *pro se* motion under 28 U.S.C. § 2255, seeking to vacate the 274-month sentence imposed on him after his plea of guilty to count I of the indictment charging him under 21 U.S.C. § 846 with conspiring to distribute and possessing with intent to distribute, more than five kilograms of cocaine. After review of the motion, we appointed the Federal Public Defender to represent him. The public defender filed an "amended" 2255 motion and an "evidentiary hearing memorandum" which raise additional grounds for relief.

The pro se motion makes the following arguments, all based on trial counsel's ineffectiveness: (1) counsel told the defendant that he would receive a maximum of ten years in prison if he pled guilty, less than half of the almost 22-and-one-halfyear sentence he did receive; (2) counsel failed to explain the nature of the plea agreement; (3) counsel improperly stipulated that defendant was a manager or supervisor of the conspiracy, leading to

an enhanced sentence; (4) counsel did not take a direct appeal although defendant instructed him to do so; and (5) counsel failed to insure that defendant's sentence was comparable to his coconspirators.

The amended motion adds the following ground: the court did not advise the defendant pursuant to Fed. R. Crim. P. 32(a)(2) at his guilty-plea or sentencing hearings of his right to appeal. The "evidentiary hearing memorandum" adds two grounds. First, the plea should be vacated because the court violated Fed. R. Crim. P. 11(c) by not advising the defendant at the time of his plea of: (1) the mandatory minimum penalty; (2) the maximum possible penalty; (3) the effect of any supervised release term; (4) the right to assistance of counsel at trial; (5) the right to confront and cross-examine witnesses at trial; (6) the right against compelled self-incrimination at trial; and (7) that any statements made under oath could be used against the defendant in a later prosecution for perjury or false statements. Second, the sentence should be vacated because the court did not ask the defendant if his plea was the result of any threats or promises outside the plea agreement. The defendant maintains that the latter failure was especially prejudicial because it would have revealed the defendant's erroneous understanding that he was only going to receive a 10-year term.

On June 10, 1997, we held a hearing on the motion. Based on that hearing and the transcripts of prior proceedings, we provide the following background.

II. Background.

On April 3, 1990, the defendant was charged in an indictment with the following offenses: (1) in count I, conspiracy to distribute and possess with intent to distribute cocaine from March 1989 through January 19, 1990, in violation of 21 U.S.C. 841(a)(1) and 846; (2) in count II, distribution and possession with intent to distribute cocaine on September 27, 1989, in violation of 21 U.S.C. § 841(a)(1); (3) in count III, distribution and possession with intent to distribute six ounces of cocaine on January 13, 1990, within 1,000 feet of a school in violation of 21 U.S.C. § 845a(1); and (4) in count IV, conspiracy with a minor for the purpose of distributing cocaine from December 20, 1989, through January 13, 1990, in violation of 21 U.S.C. § 845b.

In January 1992, the defendant executed a plea agreement, dated January 2, 1992. In paragraph one he agreed to plead guilty to count I of the indictment. Paragraph one also advised the defendant that the "maximum penalty for the offense is imprisonment for a period no less than 10 years and a maximum of life imprisonment and/or a fine of $4,000,000, a term of supervised release to be determined by the court, the costs of prosecution as well as an assessment in the amount of $50." (Plea agreement, ¶ 1). Finally, this paragraph stipulated that "the defendant's personal involvement in this conspiracy . . . was no less than 15 kilos and no more than 50 kilos of cocaine."

The agreement also informed the defendant that the court was not a party to the agreement and was not bound by any recommendation that he or the government might make concerning the sentence to be imposed. (*Id.*,

¶ 14). "Thus, the Court [was] free to impose upon the defendant any sentence up to and including the maximum sentence of imprisonment for life. . . . " (*Id.*) (brackets added). The government was allowed to recommend a sentence that it "consider[ed] appropriate based upon the nature and circumstances of the case and the defendant's participation in the offense . . . (*Id.*, ¶ 9) (brackets added). The government specifically reserve[d] the right to recommend a sentence up to and including the maximum sentence. . . . " (*Id.*) (brackets added). Finally, the agreement provided that the defendant could not withdraw his guilty plea if he was dissatisfied with the court's sentence or if it declined to follow any of the parties' recommendations as to sentencing, (*id.* at ¶ 15), and it contained a merger clause, specifying that there were no other written or oral agreements and that "[n]o other promises or inducements" had been made to the defendant. (*Id.*, ¶ 29) (brackets added).

The defendant signed the agreement under a paragraph stating: "I have read this agreement and carefully reviewed every part of it with my attorney. I fully understand it and I voluntarily agree to it." His attorney also signed it under a paragraph stating: "I am the defendant's counsel. I have carefully reviewed every part of this agreement with the defendant. To my knowledge my client's decision to enter into this agreement is an informed and voluntary one."

The defendant is an Hispanic born in the Dominican Republic. He has some knowledge of English, but a Spanish interpreter was present at all court proceedings.

On January 6, 1992, a guilty-plea hearing was held. The prosecutor opened the hearing by noting the essentials of the agreement – that the defendant would plead guilty to count I and that his quantity of cocaine would be set at not less than 15 nor more than 50 kilograms of cocaine. (doc. 60 at p. 6). Defense counsel then noted the provision that the government would move for a downward departure if the defendant provided assistance. (*Id.*).

Later in the hearing, the court questioned the defendant about the knowing and voluntary nature of the plea. The defendant indicated that he had consulted with his attorney about the change of plea, that counsel had fully informed him of his rights "as far as [the defendant] kn[e]w," that he understood that he did not have to plead guilty, that he could be tried by a jury, that by pleading guilty he gave up the presumption of innocence and relieved the government of the necessity to present evidence, and that his guilt was established by his admission of guilt to the court. (*Id.* at pps. 7-8) (brackets added).

The court then turned to the sentencing issue. The defendant stated that defense counsel had explained the sentencing guidelines to him, and that he understood the sentence was controlled to some extent by the quantity of cocaine attributed to him, and that the government had calculated his potential sentence was in the "range of 20 years and upwards." (*Id.* at pps. 9-10). The defendant also said that he was satisfied with counsel's representation, (*id.* at p. 8), and that he "just want[ed] to plead guilty and get on with the sentencing." (*Id.* at p. 12) (brackets added).

On April 22, 1992, a sentencing hearing was held. Defendant objected to the four-level enhancement the government sought under U.S.S.G. § 3B1.1(a) for being an organizer or leader of the conspiracy. The defendant testified, seeking to minimize his role in the offense. The prosecutor cross-examined him and proffered transcripts of the testimony of his coconspirators in related criminal proceedings concerning his position in the conspiracy. Eventually, the government and defense counsel stipulated that the defendant would be subject to a three-level enhancement under § 3B1.1(b) as a manager or supervisor. (Doc. 50, sentencing transcript at p. 19).

Defense counsel then argued on his client's behalf as to an appropriate sentence. He acknowledged the defendant's involvement in the sale of narcotics, but then said:

> Almost from the very outset, however, Your Honor, Mr. Peguero came to me and indicated a willingness to cooperate and a willingness to enter a plea of guilty. Now at that time he was somewhat uncertain as to the nature of his sentence, but, in any event, he did indicate he wanted to plead guilty, he wanted to cooperate and get this behind him. . . .

(*Id.* at pps. 20-21).

At the time of sentencing, the defendant had four prior convictions in New Jersey, all for drug offenses.

The defendant was subject to U.S.S.G. § 5G1.3, allowing the court to impose concurrent or consecutive sentences or partially concurrent or consecutive sentences, for having committed his federal offense while he was on bail from his two 1988 New Jersey drug offenses. He was

also subject to an enhancement under § 2J1.7 of the guidelines for commission of an offense while on release. Additionally, he was classified in criminal history category VI as a career offender because he had at least two prior convictions for drug offenses as an adult. The defendant's guideline range was 292 months to 365 months. The court took sections 5G1.3 and 2J1.7 into account by going below the minimum guideline to 274 months imprisonment, not as much of a reduction if only § 5G1.3 had been considered alone, but determined to be appropriate when the enhancement under § 2J1.7 was considered. He was also given five years of supervised release. This sentence was ordered to be served consecutively to the New Jersey sentence of 10 years of which the defendant was required to serve four years.

The defendant took no direct appeal of his conviction or sentence. He later sought some judicial relief. In January 1995, he filed a motion for free transcripts, alleging that he needed the transcripts because his memory of the guilty-plea and sentencing hearings was not good and he wanted to raise three specific grounds for relief from his conviction: (1) the career offender guideline should not have been used to set his sentence; (2) he should have received credit on his sentence from the date of his indictment rather than the date of sentencing; and (3) trial counsel was ineffective for not raising the first two grounds. By order, dated February 24, 1995, we denied the motion, in part, because he had no 2255 motion pending at the time and because the grounds he wished to raise would not have appeared in the record in any event.

On March 16, 1995, the defendant filed a "motion for clarification of sentence," an apparent attempt to lay the groundwork for an attack on his sentence by finding out the factors that had been considered at sentencing.

There were also some extrajudicial attempts at relief. In August 1993, his mother wrote the court asking for a reduction in his sentence. In that letter, his mother also said: "My son's Lawyer told told (sic) him that if he declared himself guilty he would get a sentence of seven years, but it was not truth because he received a sentence of 23 years." At the bottom of this letter, the defendant's wife also asked for assistance but did not mention the purported sentencing deal. (On August 18, 1993, the Probation Office responded to that letter by noting that the court was unable to change the sentence imposed.) In July 1995, his mother wrote again asking that he be deported because she had cancer and she wanted to be with him in the time she had left.

The current 2255 proceeding, initiated on December 10, 1996, coming some four-and-one-half years after his sentence, is the defendant's first attempt at postconviction relief, and the first time he ever personally brought to the court's attention his claim that his lawyer had promised him a 10-year sentence.

At the hearing held to resolve the factual issues raised, his trial counsel testified. Counsel had received discovery material from the government in December 1991 concerning the merits of the case-against Peguero, consisting of 39 pieces of evidence including witness statements and evidence from the trial of a coconspirator, Miguel "Pepe" Feliciano-Rosario. (Doc. 78 at pps. 19-21).

Counsel advised the defendant that a significant case could be brought against him. (*Id.* at 21-22). Counsel also stated that he always had an interpreter with him when he met with Peguero, at least after their initial meeting. (*Id.* at 25).

As to review of the plea agreement, counsel said that he went over it in detail with the defendant, including such provisions as the defendant's cocaine quantity as well as his maximum sentence. (*Id.* at 23-25). He believes he told the defendant, based on notes in his file, that he was looking at 210 to 324 months in prison. (*Id.* at 26). He also believes that he told the defendant about the career-offender provision but does not recall specifically doing so. (*Id.* at 11).

Counsel also testified about a portion of a letter he had written to the prosecutor, attached as an exhibit to the government's response to the 2255 motion. Counsel wrote that the defendant "may not have fully comprehended the situation." Counsel said that he meant by this statement that defendants often do not understand the length of federal sentences as opposed to state sentences. (*Id.* at 14).

As to taking an appeal, counsel testified that he told Peguero he had a right to an appeal and that he would represent him. (*Id.* at 12-13, 31). However, the defendant did not want to take an appeal, preferring instead to cooperate with the government in an attempt to reduce his sentence. (*Id.* at 13, 31). The defendant never wrote him after that asking for an appeal; he just wrote letters with information that might be helpful to the government. (*Id.* at 32-33). The first time counsel heard about the

defendant's contention that he had wanted an appeal was earlier in 1997 when the prosecutor contacted him after the 2255 motion had been filed. (*Id.* at 33).

As to counsel's alleged statement that the defendant would receive only 10 years, counsel denied making it. (*Id.* at 26). Instead, he told the defendant he would receive a "significant sentence" and that he was unsure of the exact length. (*Id.*).

Peguero also testified. As to review of the plea agreement, Peguero acknowledged meeting with counsel personally and that an interpreter was present but that they only met about the agreement for about five to 10 minutes. (*Id.* at 43). He testified that the agreement was never read to him, explained to him, or summarized for him. (*Id.* at 43). Peguero acknowledged that the signature on the agreement was his, but denied filling in the date. (*Id.* at 49-50). He signed it because counsel advised him he would only get 10 years. (*Id.* at 54).

Peguero met with his attorney before the guilty-plea hearing and had a fast conversation. Counsel told him through the interpreter that he would get 10 years. (*Id.* at 45). In fact, "from the first time they met," counsel had told him he would get 10 years. (*Id.* at 41). Later, when he received 274 months at the sentencing, he felt a "shock in [his] heart." *Id.* at 46) (brackets added). He was "left dumb." (*Id.* at 61). His attorney left after the sentencing hearing, and he did not see him. (*Id.* at 46).

The defendant understood most of the guilty-plea hearing. (*Id.* at 56). He was not sick at the time or on medication. (*Id.*). At the 2255 hearing, the prosecutor confronted him with his affirmative responses to the

court's questions at the guilty-plea hearing about consulting with his attorney about the change of plea, being fully informed by his counsel of his rights, and being satisfied with counsel's representation. Peguero responded that he answered the first and third questions that way because his lawyer had told him he would get 10 years. (*Id.* at 57). As to his reaction to the government's calculation of his sentence as greater than 20 years, he said that he did not pay attention, that he believed in his attorney. (*Id.* at 59). He also said that he was confused and disoriented at the time, (*id.* at 56), and that "sometimes you hear some things and you cannot comprehend them." (*Id.* at 59). The defendant would have mentioned the promise of a 10-year sentence at the guilty-plea hearing, and he would not have pled guilty, if he had known the promise would not be enforced. (*Id.* at 48).

As to an appeal, at the moment of sentencing, Peguero said in English that he wanted to appeal. (*Id.* at 46). Shortly after the sentencing, while he was at Union County Prison, a fellow prisoner wrote a letter to his attorney, dated April 29, 1992: (1) expressing the defendant's confusion about the sentence he received and mentioning the 10-year sentence he was supposed to have gotten; (2) requesting that an appeal be taken; and (3) offering to consider cooperating. Contrary to his statement at the 2255 hearing, the defendant also questioned why his counsel would not meet with him before the sentencing hearing. (*Id.* at 47; government's exhibit 1 at the 2255 hearing).

As an explanation as to why he had waited so long to seek judicial relief from his sentence, the defendant stated that "he thinks" he, his wife and his mother had all

written letters to the court about the 10-year sentence he was supposed to have received. (Doc. 78 at p. 63). His mother's letter was four years ago. Additionally, his wife would call his trial counsel and complain. (*Id.* at 63). He also hinted as a possible explanation for the delay that he had no money for transcripts and the court had denied his motion for free transcripts. (*Id.* at 61).

III. Discussion.

A. The Stipulation Concerning the Defendant's Role as a Manager or Supervisor of the Conspiracy and the Disparity Between the Defendant's Sentence and his Coconspirators.

We will deal first with the claims that trial counsel improperly stipulated that defendant was a manager or supervisor of the conspiracy, which led to a three-level enhancement, and that counsel failed to insure that defendant's sentence was comparable to his coconspirators.

We agree with the government that the first of these claims must fail because the defendant has provided no factual support for the claim that he was not an organizer or supervisor. We also note that the presentence report's description of the offense conduct supports the enhancement.

The second of these claims also fails because the plaintiff similarly provides no support for his claim that he is entitled to the same sentence as certain of his conspirators. A mere disparity in the sentences received by codefendants under the guidelines is not a reason for a

downward departure. *United States v. Higgins*, 967 F.2d 841 (3d Cir. 1992) (citing *United States v. Joyner*, 924 F.2d 454 (2d Cir. 1991)). The government also points out that their roles in the offense were not as great as the defendant's.

B. The Failure to Take an Appeal.

A direct appeal in a federal criminal case is a matter of right. *United States v. Peak*, 992 F.2d 39, 41 (4th Cir. 1993). Thus, the sixth amendment right to counsel applies to such an appeal, *see id.*, and defense counsel must appeal when requested even if there are no meritorious issues. *Id. See also United States ex rel. O'Brien v. Marone*, 423 F.2d 865, 868 (3d Cir. 1970) (dicta).

The key here, however, is whether the defendant requested an appeal. Defense counsel need not appeal if his client tells him not to so. Trial counsel testified that he did not appeal because his client did not want an appeal. Counsel stated that defendant preferred instead to concentrate on providing cooperation so that his sentence would be reduced.

Although defendant testified that he requested an appeal immediately after being sentenced and produced a copy of a letter he said he mailed to counsel a few days after sentencing, we accept counsel's version of events. First, it is the most consistent with prior proceedings. The reason counsel stated for not taking an appeal, cooperation in the hope of obtaining a reduced sentence, appears as early as the guilty-plea hearing when the first point counsel made at that hearing was the government's

agreement to move for a reduced sentence in return for cooperation. Similarly, at the sentencing hearing, counsel tried to minimize the sentence the defendant would receive by pointing out that "[a]lmost from the very outset," the defendant indicated a willingness to cooperate, as well as plead guilty.

Second, we can take into account how long it has taken the defendant to finally present this claim to the court, having raised it for the first time in his 2255 motion some four and one-half years after sentencing. Even though the defendant argues that he told his lawyer at sentencing to tale an appeal, the failure of counsel to do so was never mentioned in either of the motions the defendant filed after he was sentenced or in any letters to the court. The need for a transcript cannot excuse the late filing since the lack of a transcript did not prevent the defendant from setting forth specific grounds for relief in his January 1995 motion for free transcripts.

Third, we note our experience with his trial counsel in previous matters. Counsel is an able lawyer, honest in his dealings with the court in the past, and there is no reason why he would not have taken an appeal if directed by defendant, or why he would deny having been asked to do so. Unfortunately for defendant, we can think of a very good reason why he would now want to be untruthful about his past desire for an appeal and fabricate evidence in support of his current claims.

We therefore reject the claim that counsel failed to take a requested appeal.

C. Counsel's Promise of a 10-Year Sentence and the Explanation of the Plea Agreement.

"A guilty plea induced by promises that divest the plea of its voluntary character is void." *Zilich v. Reid*, 36 F.3d 317, 321 (3d Cir. 1994) (citing *Machibroda v. United States*, 368 U.S. 487, 493, 82 S.Ct. 510, 513, 7 L.Ed.2d 473, 478 (1962)). An unfulfilled promise of a particular term of imprisonment is such a promise. *See Zilich*, 36 F.3d at 321 (an unkept promise of probation in return for a guilty plea negates the voluntariness of the plea).

In the instant case, the defendant maintains that his lawyer told him he would receive only a 10-year sentence. Counsel has testified that no such promise was made. For the second and third reasons advanced above in regard to the appeal issue, we resolve this factual dispute against the defendant.

The first time the defendant ever moved in court for relief from his sentence on the ground that he was supposed to receive a 10-year sentence was in his 2255 motion, filed some four and one-half years after his sentencing, even though at sentencing the time he received caused him to be "struck dumb" and to feel a "shock to [his] heart," and even though he raised other grounds for relief in his motion for free transcripts. It is true that his mother wrote a letter to the court in August 1993, but she had no personal knowledge of any conversations her son had with his counsel (and aside from that she said he had been promised seven years, not 10 years).

Additionally, we can conceive of no reason why his trial counsel would not affirm the existence of this purported promise. To begin with, it is odd that "from the

first time they met" counsel would have told him he would only get 10 years. How counsel could make this prediction so early on, or why he would do so, is difficult to understand. Counsel is an experienced courtroom litigator, he has in fact tried cases before the court in the past, so it seems that he would have simply tried the case if he had to. Perhaps one reason he did not was the strength of the government's case conveyed to him by the prosecutor.

We turn now to the claim that counsel did not explain the plea agreement to the defendant. For the reasons set forth above, we resolve this factual dispute against the defendant as well. We find that the plea agreement in all material respects was explained to the defendant, that the defendant understood it, and that he signed it knowing what it contained.

The plea agreement provides an additional reason for rejecting the claim that trial counsel told him he would only receive 10 years. The agreement contains no such provision and, to the contrary, advises the defendant he could receive life in prison, that the government could recommend a sentence up to life, and that the court could impose the sentence it believed was appropriate.

D. The Court's Rule 11 and Rule 32 Violations.

The defendant argues that the sentence should be vacated because of the following rule violations. First, we did not advise him pursuant to Fed. R. Crim. P. 32(a)(2) at his guilty-plea or sentencing hearings of his right to appeal. Second, we did not advise him under Fed. R. Crim. P. 11(c) at the time of his plea of: (1) the mandatory

minimum penalty; (2) the maximum possible penalty; (3) the effect of any supervised release term; (4) the right to assistance of counsel at trial; (5) the right to confront and cross-examine witnesses at trial; (6) the right against compelled self-incrimination at trial; and (7) that any statements made under oath could be used against the defendant in a later prosecution for perjury or false statements. Third, we did not ask him under Rule 11(d) if his plea was the result of any threats or promises outside the plea agreement.

A mere violation of Rule 11 or Rule 32 is not enough to vacate a sentence under section 2255. *See United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979) (Rule 11); *United States v. Vancol*, 778 F. Supp. 219 (D. Del. 1991) (Rule 32). Instead, in 2255 proceedings the defendant must show that the violation "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.' " *Timmreck*, 441 U.S. at 784, 99 S.Ct. at 2087, 60 L.Ed.2d at 638; *Vancol*, 778 F. Supp. at 223. A defendant could make this showing by establishing that he "was actually unaware" of the information the Rule intended to convey" or that, if he had been properly advised by the trial judge, he would not have pleaded guilty." *Timmreck*, 441 U.S. at 784, 99 S.Ct. at 2087, 60 L.Ed.2d at 638.

In the instant case, we have already determined that the defendant knew about his right to appeal and decided not to exercise it. Thus, he cannot attack the Rule 32 violation in these proceedings.

We have also determined that he knew and understood the provisions of his plea agreement. The agreement advised him of his mandatory minimum penalty, the maximum possible penalty and that a term of supervised release would be imposed. He therefore cannot base his 2255 attack on the failure to give him this information. As to the effect of any supervised release term, the defendant cannot now complain about it when the combined term of incarceration and supervised release is less than the sentence of life imprisonment of which he was advised in the plea agreement. *See United States v. DeLuca*, 889 F.2d 503 (3d Cir. 1989).

In regard to the other violations of Rule 11(c), we note first that we did advise the defendant, and he indicated that he understood, that he did not have to plead guilty, that he could be tried by a jury, that by pleading guilty he gave up the presumption of innocence and relieved the government of the necessity to present evidence. Even after being advised of these significant rights, the defendant nonetheless pled guilty, so we do not believe that if he had been advised of his other rights, he would not have done so. (In any event, the defendant undoubtedly knew that he had the right to be represented at trial by a lawyer by the fact that trial counsel had been appointed for him.) Moreover, and more importantly, the defendant never asserted at the hearing that he did not know of these rights (the defendant had four prior convictions, so he had previous experience with the criminal-justice system), or if he had been advised of them, he would not have pled guilty.

Finally, in regard to the Rule 11(d) violation, since the defendant had not been made any promise that did not

appear in the plea agreement, the failure to ask him about any such promise was harmless.

E. Motion For Downward Departure Based on Post-conviction Rehabilitation.

The defendant filed a memorandum in support of a request for a downward departure, based on the recent Third Circuit decision in *United States v. Sally*, No. 96-1864, 1997 WL 277972 (3d Cir. May 28, 1997). *Sally* allowed such a downward departure for postconviction rehabilitation efforts when the defendant had to be resentenced after he successfully vacated one of his convictions. Here, the defendant was not successful at vacating his sentence, and it does not appear that we otherwise have the authority to vacate his sentence to take into account postconviction rehabilitation efforts. We will therefore deny the request for a downward departure. However, the defendant may refile it if he can show that we have authority to consider it in the absence of his sentence being vacated.

We will issue an appropriate order.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: July 1, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,	:	
Plaintiff	:	CRIMINAL ACTION NO. 1:CR-90-97-01
vs.	:	CIVIL ACTION NO. 1:CV-96-2143
MANUEL D. PEGUERO, Defendant	:	

ORDER

AND NOW, this 1st day of July, 1997, it is ordered that:

1. The defendant's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence, filed December 10, 1996, and his amended 2255 motion, filed June 4, 1997, are denied.

2. The defendant's request for a downward departure is denied without prejudice

3. The Clerk of court shall close this file.

/s/ William W. Caldwell
William W. Caldwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(Caption omitted in printing)

DEFENDANT'S REQUEST FOR CERTIFICATE OF APPEALABILITY

AND NOW comes the defendant, Manuel DeJesus Peguero, by his attorney Daniel I. Siegel of the Federal Public Defender's Office, and pursuant to 28 U.S.C. §2253 files this Request for Certificate of Appealability.

1. By Memorandum and Order dated July 1, 1997, this court denied Mr. Peguero's petition for post-conviction relief under 28 U.S.C. §2255.

2. Notice of Appeal is due to be filed on or before July 31, 1997.

3. Pursuant to 28 U.S.C. §2253, Mr. Peguero needs to secure from the district court a certificate of appealability identifying those issues which are approved for appeal.

4. "The decision whether to grant or deny a certificate of appealability is '[t]he primary means of separating meritorious from frivolous appeals.'" *United States v. Kozakiewicz*, 960 F.Supp. 905, 924 (W.D.Pa. 1997), citing *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S.Ct. 3383, 3394 (1983).

5. On appeal, the defendant seeks to pursue the single issue identified as ground five in his amended petition for relief under 28 U.S.C. §2255. That issue was presented as follows in defendant's brief in support of the amended petition:

> Where the defendant was not advised on the record of his right to appeal the sentence as required by Criminal Rule 32(a)(2), should the defendant be resentenced, thereby renewing his appellate rights?

6. The district court denied relief on this issue, reasoning that "[a] mere violation of Rule 11 or Rule 32 is not enough to vacate a sentence under section 2255." (District Court Memorandum of July 1, 1997, pg. 19).

7. While the district court's decision is consistent with case law from the Seventh and Eighth Circuits, it is inconsistent with the majority rule, which holds that a district court's failure to advise a defendant of his appellate rights constitutes *per se* error justifying post-conviction relief. *See Thompson v. United States*, 111 F.3d 109 (11th Cir. 1997) (collecting cases) (copy attached).

8. Given that the defendant has identified an issue on which reasonable jurists differ, it is submitted that a certificate of appealability should be granted as to that issue.

9. The government concurs in this request for a certificate of appealability.

Respectfully submitted,

Date: July 29, 1997 /s/ Daniel I. Siegel
DANIEL I. SIEGEL, ESQUIRE
Asst. Federal Public Defender
100 Chestnut Street,
Suite 306
Harrisburg, PA 17101
Attorney for Manuel DeJesus Peguero
Attorney ID #38910

(Copy of opinion in *Thomas v. United States* omitted in printing)

CERTIFICATE OF CONCURRENCE

I, DANIEL I. SIEGEL, of the Federal Public Defender's Office certify that on July 28, 1997, I contacted Assistant United States Attorney Kim D. Daniel, and he stated that the government would concur in the foregoing motion.

Date: July 29, 1997 /s/ Daniel I. Siegel
DANIEL I. SIEGEL, ESQUIRE
Asst. Federal Public Defender

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	CRIMINAL NO. 1:CR-90-97-01
v.	JUDGE WILLIAM W. CALDWELL
MANUEL DEJESUS PEGUERO	

ORDER OF COURT

AND NOW to-wit this 31st day of July, 1997, upon consideration of Defendant's Request for Certificate of Appealability pursuant to 28 U.S.C. §2253, **IT IS HEREBY ORDERED** that the request is **GRANTED**. This certificate of appealability is limited to the single issue identified at ground five of the defendant's amended petition for relief under 28 U.S.C. §2255.

BY THE COURT:

/s/ William W. Caldwell
JUDGE WILLIAM W. CALDWELL
United States District Court

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7384

UNITED STATES OF AMERICA,
Appellee

v.

MANUEL DEJESUS PEGUERO,
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
D.C. Crim. No. 90-cr-00097-1
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 1998

Before: Greenberg, Nygaard and McKee, *Circuit Judges*

(Filed February 27, 1998)

MEMORANDUM OPINION

McKee, *Circuit Judge*.

In this appeal, we are asked to review the district court's denial of Manuel DeJesus Peguero's petition for post-conviction relief, pursuant to 28 U.S.C. §2255. Peguero alleges that the district court erred as a matter of law in denying his petition for relief since the court had

previously failed to advise Peguero of his appellate rights as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure. For the reasons explained below, Peguero's argument is meritless and we will affirm the order of the district court.

I.

In 1992, Peguero pled guilty in the United States District Court for the Middle District of Pennsylvania to conspiracy to distribute and possessing with intent to distribute more than 5 kilograms of cocaine, in violation of 21 U.S.C. § 846. The court sentenced Peguero to 274 months imprisonment. The court did not advise Peguero of his appellate rights and Peguero did not file a notice of appeal.

In 1996, Peguero filed a *pro se* petition for post-conviction relief under 28 U.S.C. § 2255. After a public defender was appointed, Peguero filed an amended petition for relief. This petition requested that Peguero's sentence be vacated and the case listed for resentencing since the court had failed to notify Peguero of his right to appeal his conviction. Such acts would result in the reinstatement of Peguero's appellate rights.

In 1997, an evidentiary hearing was held where Peguero's former counsel, Rex Bickley, testified that on the day of the sentencing hearing he informed Peguero of his right to appeal. D.Ct.Op. at 10. Peguero, however, indicated that he did not wish to appeal. Rather, he wanted to cooperate with the government with the hope of securing a downward departure on his sentence for substantial assistance. Peguero himself testified that, "[at] the

moment of the sentence," he told Bickley to file an appeal. App. at 128.

The court filed a memorandum and order denying the petition for relief, finding that Peguero was sufficiently aware of his right to appeal and had knowingly waived that right. Relying on *United States v. Timmreck*, 441 U.S. 780 (1979), the court found that Peguero was not "actually unaware" of his right to appeal. Consequently, the court deemed its violation of Rule 32(a)(2) insufficient "to vacate a sentence under § 2255." D.Ct.Op. at 19.

Peguero now appeals.

II.

We have jurisdiction of final orders pursuant to 28 U.S.C. § 1291. When we review a district court's decision granting or denying a petition for post-conviction relief our standard is *de novo*. *United States v. Cleary*, 46 F.3d 307, 310 (3d Cir. 1995).

III.

Peguero argues that the district court's failure to advise him of his appellate rights is a *per se* violation, necessitating post-conviction relief. The government responds that the court's failure to notify was a "technical violation" and must be subject to a harmless error analysis.

"[A] sentencing court's failure to inform a defendant of the right to appeal following a jury conviction is 'harmless error' if the government can show by clear and convincing evidence that the defendant knew of the right

to appeal. (citation omitted). We see no reason for not applying the same analysis in the guilty plea context, where appeal rights are more limited." *McCumber v. United States*, 30 F.3d 78, 79 (8th Cir. 1994).

The court based its decision to deny Peguero's petition for post-conviction relief on several factors: 1) Peguero was aware of his appellate rights given his guilty plea and desire to cooperate with the government in exchange for a downward departure on his sentence; 2) Peguero waited over four years to file his claim for post-conviction relief; and 3) The court knew and respected Peguero's counsel, who testified that Peguero was aware of his right to appeal. *See* D.Ct.Op. at 15-16.

Without even crediting Peguero's former counsel's testimony, it is clear that Peguero knew of his right to appeal. The purpose behind Rule 32(a)(2) is to insure that a defendant is aware of this right. Consequently, the district court's error did not result in a miscarriage of justice.

IV.

The foregoing demonstrates that the court's failure was harmless and thus does not justify collateral attack by Peguero.

Affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Illegible
Circuit Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-7384

UNITED STATES OF AMERICA,
Appellee

v.

MANUEL DEJESUS PEGUERO,
Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
D.C. Crim. No. 90-cr-00097-1
District Judge: Honorable William W. Caldwell

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 1998

Before: Greenberg, Nygaard and McKee, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on February 12, 1998.

On consideration whereof, it is hereby ordered and adjudged by this court that the order denying post-conviction relief entered on July 1, 1997 be and the same is affirmed.

ATTEST:

/s/ Patricia A. Cole
Acting Clerk

FEB 27 1998

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(5)

No. 97-9217

In The

Supreme Court of the United States

October Term, 1998

MANUEL DEJESUS PEGUERO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF PETITIONER

DANIEL ISAIAH SIEGEL*
Assistant Federal Public Defender
JAMES VINCENT WADE
Federal Public Defender for
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**Counsel of Record*

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QUESTION PRESENTED

DOES A DISTRICT COURT'S FAILURE TO INFORM THE DEFENDANT OF HIS APPELLATE RIGHTS CONSTITUTE "AN OMISSION INCONSISTENT WITH THE RUDIMENTARY DEMANDS OF FAIR PROCEDURE," THUS JUSTIFYING POST-CONVICTION RELIEF WITHOUT PROOF OF SPECIFIC PREJUDICE?

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OPINIONS AND ORDERS IN THE COURTS BELOW

The district court memorandum and order, filed July 1, 1997, has not been published. It is reprinted in the joint appendix at J.A. 168. The court of appeals memorandum opinion and judgment order, filed February 27, 1998, has not been published. It is noted at 142 F.3d 430 (Table), and reprinted in the joint appendix at J.A. 192.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals was entered on February 27, 1998 (J.A. 192). The petition for writ of certiorari was filed on May 22, 1998, and was granted on September 29, 1998.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

1. Rule 37(a)(2) of the Federal Rules of Criminal Procedure, effective March 21, 1946, provided as follows:

> (2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be

advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Order of the Supreme Court, February 8, 1946, 327 U.S. 821, 857-58. Rule 37 was abrogated, effective July 1, 1968, by Order of the Supreme Court, December 4, 1967, 389 U.S. 1063, 1066.

2. Rule 32(a)(2) of the Federal Rules of Criminal Procedure, effective July 1, 1966, provided as follows:

(2) NOTIFICATION OF RIGHT TO APPEAL. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Order of the Supreme Court, February 28, 1966, 383 U.S. 1087, 1107.

3. Effective December 1, 1975, Rule 32(a)(2) of the Federal Rules of Criminal Procedure was amended to provide as follows:

(2) *Notification of right to appeal.* – After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an

appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Order of the Supreme Court, April 22, 1974, 416 U.S. 1001, 1014.

4. Effective December 1, 1989, Rule 32(a)(2) of the Federal Rules of Criminal Procedure was amended to provide as follows:

(2) *Notification of right to appeal.* – After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to the pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

Order of the Supreme Court, April 25, 1989, 490 U.S. 1135, 1140.

5. Effective December 1, 1994, Rule 32 of the Federal Rules of Criminal Procedure was amended to provide, at Rule 32(c)(5), as follows:

> (5) *Notification of right to appeal.* – After imposing sentence in a case which has gone to trial on a plea of not guilty, the court must advise the defendant of the right to appeal. After imposing sentence in any case, the court must advise the defendant of any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court must immediately prepare and file a notice of appeal on behalf of the defendant.

Order of the Supreme Court, April 29, 1994, 511 U.S. 1175, 1184-85.

STATEMENT OF THE CASE

1. Overview

In 1992, following his plea of guilty to one count of drug conspiracy, 21 U.S.C. § 846, Manuel Peguero appeared before the United States District Court for the Middle District of Pennsylvania and received a sentence of 22 years, 10 months imprisonment (J.A. 56). The judge did not advise Mr. Peguero of his appellate rights, as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure [now Rule 32(c)(5)]. No direct appeal was filed. In 1996, Mr. Peguero filed a motion under 28 U.S.C. § 2255 requesting, *inter alia*, the reinstatement of his right to pursue a direct appeal (J.A. 58).

There is a split among the circuits regarding the legal standard applicable when a federal prisoner seeks post-conviction relief based upon the district court's failure to

advise him of his appellate rights. Under the majority rule reflected in the published decisions of seven circuits, defendant's right to a direct appeal is reinstated on a *per se* basis; under the minority rule adopted by two circuits, the district court must hold a hearing to determine whether the defendant was prejudiced by the judge's omission. *See Thompson v. United States*, 111 F.3d 109, 110 (CA11 1997) (collecting cases). In the instant case, the district court applied the minority rule and denied relief under 28 U.S.C. § 2255 (J.A. 168, 183-84). The district court's order was affirmed in the United States Court of Appeals for the Third Circuit (J.A. 192). Petitioner seeks application of the majority rule. Certiorari was granted on September 29, 1998.

2. The Charge and the Plea

On April 3, 1990, an indictment was filed in the United States District Court for the Middle District of Pennsylvania charging the petitioner, Manuel DeJesus Peguero, with five violations of federal drug law (J.A. 16). Count one charged conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846; count two charged distribution of cocaine, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; count three charged distribution of cocaine in a school zone, in violation of 21 U.S.C. § 845a and 18 U.S.C. § 2; count four charged using a minor in a drug conspiracy, in violation of 21 U.S.C. § 845b; and count five charged maintaining premises to further a drug crime, in violation of 21 U.S.C. § 856. Pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, a private attorney, L. Rex Bickley, was appointed to represent Mr. Peguero (J.A. 2, 4, Items 9 and 20).

On January 6, 1992, Mr. Peguero appeared with counsel for a guilty plea hearing before the Honorable William W. Caldwell of the United States District Court for the Middle District of Pennsylvania (J.A. 22). Pursuant to a written agreement, Mr. Peguero agreed to plead guilty to count one of the indictment, charging conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 (J.A. 80). Paragraph 10 of the plea agreement provided that Mr. Peguero would cooperate with authorities, and in exchange the government agreed to consider moving for a downward departure for substantial assistance (J.A. 23, 83-84).

3. Sentencing and the Failure to Notify of Appellate Rights

A sentencing hearing was conducted on April 22, 1992 (J.A. 35). The record reflects that the prosecutor was not satisfied with the defendant's cooperation and did not move for a downward departure (J.A. 43). The district court imposed a sentence of 274 months (22 years, 10 months) imprisonment, plus five years supervised release (J.A. 56).

At the time sentence was imposed, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided that after imposing sentence, "the court shall advise the defendant of any right to appeal the sentence." Rule 32(a)(2) of the Federal Rules of Criminal Procedure, as amended, effective December 1, 1989. Order of the Supreme Court, April 25, 1989, 490 U.S. 1135, 1140. Similar language now appears at Criminal Rule 32(c)(5).

The record reflects that the judge did not advise Mr. Peguero of his right to appeal at the sentencing hearing (J.A. 35-57), or at the guilty plea hearing (J.A. 22-34). Additionally, the written plea agreement did not contain any language putting Mr. Peguero on notice of his right to appeal (J.A. 80-91). No direct appeal was filed.

4. Defendant's Motion for Post-Conviction Relief

On December 10, 1996, Mr. Peguero filed a *pro se* motion for post-conviction relief under 28 U.S.C. § 2255 (J.A. 58). The motion alleged, *inter alia*, that counsel had been ineffective in failing to file a direct appeal; in this regard, Mr. Peguero asserted that "although requested, no appeal filed by counsel" (J.A. 65). A responsive brief was filed by the government (J.A. 10, Item 57), and the Federal Public Defender was appointed to represent Mr. Peguero (J.A. 11, Item 65).

On June 4, 1997, the Federal Public Defender filed an amended petition under 28 U.S.C. § 2255, adding the claim that the district court had failed to advise the defendant of his appellate rights as required by the former Criminal Rule 32(a)(2) [currently, Rule 32(c)(5)] (J.A. 92, 93). In a brief filed in support of the amended petition, counsel cited the Third Circuit decisions in *United States v. Deans*, 436 F.2d 596, 599 n.3 (CA3), *cert. denied*, 403 U.S. 911 (1971), and *Farries v. United States*, 439 F.2d 781 (CA3 1971). Defendant argued that under *Deans* and *Farries*, the district court's failure to comply with Rule 32(a)(2) required, as a matter of law, that the defendant be resentenced so that he could thereafter file a timely notice of appeal (J.A. 12, Item 72).

The Federal Public Defender raised two other claims on behalf of Mr. Peguero. In an evidentiary hearing memorandum, counsel noted that the petitioner had preserved a claim regarding the conduct of the guilty plea hearing (J.A.12, Item 75). Additionally, counsel filed a memorandum requesting that the district court consider a downward departure for post-conviction rehabilitation pursuant to the recent Third Circuit decision in *United States v. Sally*, 116 F.3d 76 (CA3 1997) (J.A.12, Item 73).

5. The Evidentiary Hearing

An evidentiary hearing was conducted on June 10, 1997, before the Honorable William W. Caldwell of the United States District Court for the Middle District of Pennsylvania (J.A. 94). At this hearing, the prior attorney, Mr. Bickley, and the defendant, Mr. Peguero, presented conflicting testimony on the question of whether the defendant had chosen to waive his appellate rights.

Attorney Bickley testified that he informed Mr. Peguero of his right to appeal, but that Mr. Peguero wanted to cooperate with the authorities and did not want counsel to take an appeal (J.A. 104-05). Mr. Bickley was not sure whether this conversation occurred before or after the sentencing hearing (J.A. 123). Prior counsel was unable to produce any documentary evidence to support his claim that he had informed the defendant of the right to appeal. He did not write a letter to the client (J.A. 105), and did not dictate a memo to his file (J.A. 105). When asked whether he noted on his file that the defendant was waiving his appellate rights, Mr. Bickley responded "[i]f I did, I can't find it." (J.A. 105).

By contrast, Mr. Peguero testified that immediately after the sentencing, he asked his attorney to file an appeal (J.A. 138-39, 153). He further testified that he sent Mr. Bickley a letter directing his attorney to file the appeal (J.A. 139, 155-159). Mr. Peguero was cross-examined regarding the authenticity of the letter (J.A. 156-160), and a copy of the letter was admitted as government exhibit No. 1 (J.A. 160, 166-67). Mr. Bickley was recalled to the witness stand by the government, and testified that he never received any such letter (J.A. 163-64).

6. Ruling by the District Court

By unpublished memorandum and order dated July 1, 1997, the district court denied defendant's motion for post-conviction relief (J.A. 168). The district court accepted counsel's version of events, discounted Mr. Peguero's version of events, and found that "the defendant knew about his right to appeal and decided not to exercise it." (J.A. 184). In addressing the failure to advise the defendant of his appellate rights, as required by former Rule 32(a)(2), current Rule 32(c)(5) of the Federal Rules of Criminal Procedure, the district court denied relief, citing this Court's decision in *United States v. Timmreck*, 441 U.S. 780, 99 S.Ct. 2085 (1979) (J.A. 184).

On July 29, 1997, Mr. Peguero filed a request for a certificate of appealability on the Rule 32(a)(2) issue (J.A. 188). The prosecutor concurred in the request (J.A. 190), and the district court granted the certificate (J.A. 191). A timely notice of appeal was filed on July 30, 1997 (J.A. 13, Item 83).

7. Appeal in the Third Circuit

In his brief in the United States Court of Appeals for the Third Circuit, Mr. Peguero did not challenge the factual findings of the district court. Rather, Mr. Peguero cited the Third Circuit precedents in *United States v. Deans*, 436 F.2d 596 (CA3 1971) and *Farries v. United States*, 439 F.2d 781 (CA3 1971) and again argued that reinstatement of the right to appeal was required as a matter of law (J.A. 15, docket entry of 9/26/97). By an unpublished memorandum and order, the court of appeals affirmed the order denying post-conviction relief (J.A. 192). There was no discussion of the Third Circuit precedents.

8. The Petition for Writ of Certiorari

Mr. Peguero filed a timely petition for writ of certiorari, seeking relief from the judgment of the court of appeals. In support of his request for certiorari review, petitioner noted a conflict among the courts of appeals regarding the legal standard to be applied when a prisoner files a petition under 28 U.S.C. § 2255, claiming that the district court failed to notify the defendant of his appellate rights, as required by the former Rule 32(a)(2), the current Rule 32(c)(5) of the Federal Rules of Criminal Procedure.

The majority rule, reflected in the published decisions of seven circuits, provides that failure to advise the defendant of his appellate rights constitutes error *per se*, requiring that the defendant be resentenced so that he or she might thereafter file a timely notice of appeal. *United States v. Benthien*, 434 F.2d 1031, 1032 (CA1 1970); *Reid v. United States*, 69 F.3d 688, 689 (CA2 1995); *United States v. Deans*, 436 F.2d 596, 598-99 (CA3 1971); *Paige v. United States*, 443 F.2d 781, 782 (CA4 1971); *United States v. Butler*, 938 F.2d 702, 703-04 (CA6 1991); *Thompson v. United States*, 111 F.3d 109, 110-11 (CA11 1997) (collecting cases); and *United States v. Sanchez*, 88 F.3d 1243, 1246-47 (CADC 1996).

Courts in the majority have recognized three situations where the *per se* rule is not applicable. First, the Third Circuit will not grant relief where the record reflects that the district court judge advised the defendant of his appellate rights at a guilty plea hearing held close in time to the sentencing hearing. *Hoskins v. United States*, 462 F.2d 271, 274-75 (CA3 1972). Second, the Eleventh Circuit will not entertain the claim where the defendant did, in fact, file a timely appeal. *United States v. Chang*, 142 F.3d 1251 (CA11 1998). Third, the Second and Sixth Circuits will deny relief where the defendant signed a plea agreement expressly waiving the right to appeal. *Valente v. United States*, 111 F.3d 290, 293 (CA2 1997); *Everard v. United States*, 102 F.3d 763, 765-66 (CA6 1996), *cert. denied*, 519 U.S. 1139 (1997).

A minority approach, applied by two circuits, requires that evidentiary hearings be conducted to determine whether the defendant was prejudiced by the violation of Rule 32(a)(2). *United States v. Drummond*, 903 F.2d 1171, 1174 (CA8 1990), *cert. denied*, 498 U.S. 1049 (1991) and *Tress v. United States*, 87 F.3d 188, 189 (CA7 1996). The Eighth Circuit puts the burden on the government to prove by clear and convincing evidence that the defendant waived his right to an appeal. *United States v. Drummond, supra*, 903 F.2d at 1174. The Seventh Circuit also places the burden of proof on the government, but has

not yet ruled on the applicable standard of proof. *Tress v. United States, supra*, 87 F.3d at 190.

In seeking the reinstatement of his right to a direct appeal, Mr. Peguero relies exclusively on the majority rule. He argues that relief should be granted as a matter of law, because the failure to inform a defendant of his appellate rights is "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962), *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979).

SUMMARY OF THE ARGUMENT

Petitioner Manuel Peguero is serving a sentence of 22 years, 10 months imprisonment on a federal conviction for drug conspiracy. At sentencing, the district court failed to advise him of his appellate rights, as required by the then-applicable version of Rule 32(a)(2) of the Federal Rules of Criminal Procedure. No direct appeal was filed, and petitioner sought post-conviction relief under 28 U.S.C. § 2255. Following an evidentiary hearing, the district court denied relief, finding that Mr. Peguero "knew about his right to appeal and decided not to exercise it" (J.A. 183-84). The district court order was affirmed in the court of appeals (J.A. 192). Mr. Peguero seeks reinstatement of his right to a direct appeal.

The petitioner is entitled to relief under 28 U.S.C. § 2255, notwithstanding the absence of demonstrated prejudice, because the district court's failure to advise him of his appellate rights constitutes "an omission

inconsistent with the rudimentary demands of fair procedure." *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979). Relying upon the approach taken in the majority of federal circuits, petitioner seeks application of a *per se* rule of relief. *Thompson v. United States*, 111 F.3d 109, 110 (CA11 1997) (collecting cases).

The rule requiring judicial notification of appellate rights protects the defendant's "fundamental decision" on whether to pursue a direct appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). Absent a judicial warning, there is a genuine risk that the defendant will never be made aware of his opportunity to pursue a direct appeal. *Advisory Committee Notes to the 1966 Amendment to Criminal Rule 32(a)(2)*. For this reason, violation of the "advice of rights" rule presents an unusual structural error which cannot be effectively addressed through direct appeal.

Where the transcript of the sentencing hearing reflects an omission of the judicial warning, the majority *per se* approach permits the district court judge to issue an order reinstating the right to appeal and directing the clerk to file a notice of appeal on behalf of the defendant. *Gaeta v. United States*, 921 F.Supp. 864 (D. Mass. 1996) (Tauro, C.J.). Under the minority rule, by contrast, the district court must hold an evidentiary hearing to determine whether the defendant was prejudiced by the judge's omission of the appellate notice. The interests of judicial efficiency thus weigh in favor of the majority rule.

Petitioner requests that the judgment of the court of appeals be reversed, and that his right to a direct appeal be reinstated.

ARGUMENT

THE DISTRICT COURT'S FAILURE TO INFORM THE DEFENDANT OF HIS APPELLATE RIGHTS CONSTITUTES "AN OMISSION INCONSISTENT WITH THE RUDIMENTARY DEMANDS OF FAIR PROCEDURE," THUS JUSTIFYING POST-CONVICTION RELIEF WITHOUT PROOF OF SPECIFIC PREJUDICE.

When a federal prisoner seeks post-conviction relief based upon the violation of a federal rule of criminal procedure, his claim must satisfy a demanding legal standard. To prevail under 28 U.S.C. § 2255, the prisoner must show that the procedural violation constituted either "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962), *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085, 2087 (1979).

Petitioner asserts that there is at least one procedural protection that should be numbered among the rudimentary demands of fair procedure. It is the procedural protection afforded when, at the conclusion of the sentencing hearing, the judge informs the defendant of the right to pursue a direct appeal. That procedural protection, reflected at the current Rule 32(c)(5), the former Rule 32(a)(2) of the Federal Rules of Criminal Procedure, is protected on a *per se* basis in the majority of federal

circuits. Under this approach, the defendant's appellate rights are reinstated when the transcript of the sentencing hearing reflects that the judge omitted the required notice. *Thompson v. United States*, 111 F.3d 109, 110 (CA11 1997) (collecting cases).

There are five reasons why the district court's failure to warn the defendant of his appellate rights should be considered "an omission inconsistent with the rudimentary demands of fair procedure," thus justifying post-conviction relief as a matter of law. First, the rule protects a decision deemed by this court to be fundamental – the defendant's decision whether to pursue an appeal. Second, experience shows that absent a warning from the judge, there is a genuine risk that criminal defendants will lose the opportunity to pursue an appeal. Third, violation of the "advice of rights" rule is an unusual structural error which justifies relief as a matter of law. Fourth, application of a prejudice analysis risks unreliable results. Fifth, application of the *per se* rule promotes judicial efficiency.

1. The Rule Protects a Decision Deemed by this Court to be Fundamental – The Defendant's Decision Whether to Pursue an Appeal

This Court has recognized that a defendant has the ultimate authority to make four "fundamental decisions" during the course of criminal litigation: the defendant must personally decide whether to plead guilty, whether to waive a jury, whether to testify in his or her own behalf, and whether to take an appeal. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). The personal

nature of the defendant's choice regarding appeal is reflected in two relevant standards of legal ethics. The ABA Model Code of Professional Responsibility, at Ethical Consideration 7-7, states that "it is for the client to decide what plea should be entered and whether an appeal should be taken." Similarly, the Second Edition of the ABA Standards for Criminal Justice provides, at Standard 4-8.2(a), that "[t]he decision whether to appeal must be the defendant's own choice." A third standard, at Rule 1.2(a) of the ABA Model Rules of Professional Conduct, does not refer to the personal nature of the defendant's appellate choice.

Ideally, it is the defense attorney who will assure that the defendant gets the guidance he or she needs to make the "fundamental decision" regarding appeal. Under the ABA Model Code of Professional Responsibility, Ethical Consideration 7-7, it is the duty of counsel to fully advise the client regarding the prospects of success on appeal. A similar duty is recognized at Standard 4-8.2(a) of the ABA Standards for Criminal Justice (2nd Edition).

If these ethical obligations were observed with consistency, there would be no need for the judge to provide an additional notice of appellate rights. Unfortunately, experience shows that ethical considerations alone are insufficient to assure that all defendants are properly advised regarding their opportunity to pursue a direct appeal.

2. Experience Shows that Absent a Warning from the Judge, There is a Genuine Risk that Criminal Defendants Will Lose the Opportunity to Pursue an Appeal

Effective July 1, 1966, Rule 32 of the Federal Rules of Criminal Procedure was amended, at Rule 32(a)(2), to provide that after sentencing in a case that had gone to trial on a plea of not guilty, the court was obligated to advise the defendant of the right to an appeal and the right to proceed in forma pauperis. Order of the Supreme Court, February 28, 1966, 383 U.S. 1087, 1107. The 1966 amendment reflects a concern that absent a warning from the district court judge, criminal defendants might never be made aware of their appellate rights – *even if the defendants are represented by counsel*. The point is made clearly in the Advisory Committee Notes to the 1966 Amendment at Criminal Rule 32(a)(2):

> The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See e.g., *Hodges v. United States*, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without

funds to apply for leave to appeal in forma pauperis.

18 U.S.C.A., Federal Rules of Criminal Procedure, Rule 32, page 12 (West Publishing, 1976).

The concerns of the Advisory Committee are reflected in the Second Edition of the ABA Standards for Criminal Justice. The commentary to Standard 4-8.2 reflects that "a considerable body of postconviction litigation has been generated involving failures on the part of trial counsel to protect the defendant's right of appeal . . . [t]he fact situations out of which many cases have arisen indicate genuine uncertainty on the part of lawyers concerning their responsibilities after verdict."

Practical experience thus suggests that absent a warning from the judge, there is a genuine risk that defendants will lose the opportunity to choose an appeal. Because the choice is fundamental, the rule which protects that choice is fundamental, and should be treated as a rudimentary demand of fair procedure.

3. Failure to Advise the Defendant of His Appellate Rights Is an Unusual Structural Error Which Justifies Relief as a Matter of Law

Under the former Criminal Rule 32(a)(2), the current Criminal Rule 32(c)(5), the responsibility rests with the district court judge to advise the defendant of his appellate rights. The district court's failure to meet this responsibility produces an unusual structural error. The error is unusual because the normal mechanisms of criminal and appellate procedure do not provide an adequate remedy.

Customarily, when the district court makes an error of law, it is expected that defense counsel will object or take some other action to correct the error. Thus, when the district court judge fails to advise the defendant of his right to appeal, the preferred course of action is for defense counsel to request, on the record, that the defendant be warned of his appellate rights. This request will not be made, however, if the defense attorney is himself misinformed regarding the defendant's right to appeal – and the requirement of a judicial warning was included in Rule 32 precisely because of the well-founded concern that defense attorneys *were* misinformed regarding the right of appeal. For this reason, the first line of defense, an objection by defense counsel in the district court, is an inadequate remedy for violations of Criminal Rule 32(a)(2).

The second line of defense, a direct appeal, is also an inadequate remedy for violations of Criminal Rule 32(a)(2). Defendants cannot be expected to file appeals if they are unaware of their appellate rights. When there is no warning from the district court judge, there is an unacceptable risk that defendants will remain ignorant of their appellate rights. For this reason, the availability of a direct appeal is an inadequate remedy for violations of the "notice of appeal" rule.

The absence of effective corrective mechanisms in the district court and on direct appeal is relevant to the question of whether to grant post-conviction relief. In *Timmreck*, this Court rejected a post-conviction claim under Criminal Rule 11, noting that the claim "could have been raised on direct appeal . . . but was not." *United States v. Timmreck*, 441 U.S. 780, 784, 99 S.Ct. 2085,

2087 (1979). The Court went on to observe that there was no basis for allowing Timmreck's collateral attack "to do service for an appeal." *Id.*, quoting *Sunal v. Large*, 332 U.S. 174, 178, 67 S.Ct. 1588, 1590 (1947).

When dealing with violations of Criminal Rule 32(a)(2), there *is* a basis for allowing the petitioner's collateral attack to do service for an appeal. This is because the absence of a judicial warning may effectively undermine the defendant's ability to take a direct appeal. Criminal Rule 32(a)(2) thus presents an unusual structural error for which the rules of criminal and appellate procedure do not provide an effective remedy. Because the absence of judicial notice may undermine the defendant's access to a direct appeal, violation of Criminal Rule 32(a)(2) should be treated as "an omission inconsistent with the rudimentary demands of fair procedure," justifying relief as a matter of law.

4. Application of a Prejudice Analysis Risks Unreliable Results

Under the minority rule applied by the Seventh and Eight Circuits, the district court must hold an evidentiary hearing to determine whether the defendant was prejudiced by the judge's failure to advise the defendant of his or her appellate rights. In many cases, the district court will be required to assess the conflicting recollections of the defendant and the former attorney. The attorney may honestly believe that she fulfilled her responsibilities regarding the advice of appellate rights. Without documentary support, however, the attorney's recollection may be unreliable. As noted by the First Circuit, "[t]he

natural tendency of counsel is to believe they have fully performed their duties when in fact they may not have. . . . " *United States v. Benthien*, 434 F.2d 1031, 1032 (CA1 1970) (adopting *per se* rule). The potential for injustice is illustrated by the case of *United States v. Deans*, 436 F.2d 596 (CA3 1971).

In *Deans*, the defendant filed a petition for relief under 28 U.S.C. § 2255 alleging, *inter alia*, that he had not been advised of his right to appeal as required by Rule 32(a)(2) of the Federal Rules of Criminal Procedure. The defense attorney provided the prosecutor with an affidavit alleging that, at the time of sentencing, "Mr. Deans was advised both by myself and by the court that he had a right to appeal this conviction and that if he could not afford an attorney, one would be provided for him." *Id.* at 599, note 3. Subsequently, the court of appeals secured a copy of the sentencing transcript, and the transcript reflected that the district court had *not* informed the defendant of his right to appeal or his right to appointed counsel. The court of appeals determined that it would give no weight to counsel's recollections, and ruled that there was no adequate substitute for compliance on the record with Rule 32(a)(2). *Id.*

There are many reasons why a defense attorney might mistakenly testify that he advised the defendant regarding the right to appeal. An attorney who customarily advises clients regarding the right to appeal might mistakenly assume that he followed his normal practice. An attorney with a high volume of cases might mistakenly confuse past clients. Additionally, an attorney dependent upon court appointments might fear the loss of those appointments if he admits that he failed to

properly advise a defendant. Particularly where there is no letter to the client and no memorandum to the file, there is a genuine risk that counsel will mistakenly recall having advised the defendant of his or her appellate rights. This risk is avoided by adopting the *per se* rule.

5. The *Per Se* Rule Promotes Judicial Efficiency

Under the majority rule, the right to pursue a direct appeal is reinstated where the defendant is able to show, through the existing district court record, that the judge did not warn the defendant of his appellate rights. One benefit of this approach has been repeatedly recognized: the *per se* rule prevents excessive litigation and promotes judicial efficiency. See *Reid v. United States*, 69 F.3d 688, 689 (CA2 1995) ("We remain persuaded that the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2)"); *United States v. Sanchez*, 88 F.3d 1243, 1247 (CADC 1996) (same); *Thompson v. United States*, 111 F.3d 109, 111 (CA11 1997) (same). The interests of judicial efficiency weigh heavily in favor of the *per se* rule.

In the circuits where a *per se* rule is applied, there is no need for an evidentiary hearing. A review of the sentencing transcript reveals whether or not the notice was given. If the judicial notice was omitted, the district court vacates the judgment of sentence and resentences the defendant, so that he or she may thereafter file a timely notice of appeal. *Thompson v. United States, supra*, 111 F.3d at 110 (collecting cases). Indeed, a recent district court case suggests that the process may be streamlined even further.

In *Gaeta v. United States*, 921 F.Supp 864 (D. Mass 1996) (Tauro, C.J.), the defendant filed a petition under 28 U.S.C. § 2255 seeking to vacate his sentence on the ground that the district court had failed to advise him of his right to appeal. The district court granted relief, and vacated the judgment of sentence. Rather than bring the parties to the courthouse for a sentencing hearing, however, the district court simply issued an order reinstating the right to appeal and directing the clerk to file a notice of appeal on behalf of the defendant.

The procedure utilized in *Gaeta* is simple to apply. It avoids unnecessary hearings and allows the prompt disposition of *pro se* petitions. The *Gaeta* decision thus reflects that the majority rule, which reinstates appellate rights based upon the existing district court record, is far less burdensome than the minority rule, which requires evidentiary hearings and credibility assessments in every case. For these reasons, the interests of judicial efficiency weigh in favor of the majority rule.

In summary, where no direct appeal was filed, there is good reason to find that the judge's failure to warn a defendant of his appellate rights constitutes "an omission inconsistent with the rudimentary demands of fair procedure," thus justifying post-conviction relief as a matter of law. The rule protects the defendant's ability to choose an appeal, a choice which can easily be lost if the defendant is not warned of his rights on the record. The normal mechanisms of criminal and appellate procedure are inadequate to correct violations of the rule. Additionally, the interests of judicial efficiency are best served by a simple remedy which permits a prompt resolution based upon the existing district court record.

For all these reasons, it is requested that this court hold that the district court's failure to notify the defendant of his appellate rights justifies post-conviction relief as a matter of law. The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to reinstate petitioner's right to take a direct appeal.

CONCLUSION

It is respectfully requested that the judgment of the United States Court of Appeals for the Third Circuit be reversed, and that the case be remanded with instructions to reinstate petitioner's right to the take a direct appeal.

Respectfully submitted,

Date: November 10, 1998

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In the Supreme Court of the United States

OCTOBER TERM, 1998

MANUEL DEJESUS PEGUERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court may grant collateral relief under 28 U.S.C. 2255 (Supp. II 1996) on the ground that the sentencing court failed to advise the defendant of his right to appeal, as required by Rule 32 of the Federal Rules of Criminal Procedure, where the defendant knew that he had the right to appeal and elected not to appeal.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 192-195) is unpublished, but the decision is noted at 142 F.3d 430 (Table). The opinion and order of the district court denying petitioner's motion under 28 U.S.C. 2255 (Supp. II 1996) (J.A. 168-187) is unreported.

JURISDICTION

The judgment of the court of appeals (J.A. 196-197) was entered on February 27, 1998. The petition for a writ of certiorari was filed on May 26, 1998, and was granted on September 29, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

At the time of petitioner's sentencing, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided:

> *Notification of right to appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.[1]

STATEMENT

Following a plea of guilty, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. In April 1992, he was sentenced to 274 months' imprisonment, to be followed by five years of supervised release. J.A. 35-36, 56. Petitioner took no direct appeal. J.A. 193. In December 1996, petitioner filed a motion under 28 U.S.C. 2255 (Supp. II 1996) challenging his conviction and sentence. J.A. 9, 58-67.

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[1] This version of Rule 32(a)(2) was in effect from 1989 to 1994. See 490 U.S. 1135, 1140 (1989); 511 U.S. 1175, 1184-1185 (1994). The current version of that provision appears at Rule 32(c)(5) of the Federal Rules of Criminal Procedure, and is reprinted at pp. 3-4 of petitioner's brief. Unless otherwise noted, references in this brief to Rule 32 are to the version of Rule 32(a)(2) in effect at the time of petitioner's sentencing.

The district court denied the motion. J.A. 168-187. After the district court granted a certificate of appealability, J.A. 188-191, the court of appeals affirmed. J.A. 192-195.

1. On April 3, 1990, a grand jury in the Middle District of Pennsylvania indicted petitioner on charges of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possession, within 1000 feet of a school, of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) and 845a (1988); and conspiracy with a minor to distribute cocaine, in violation of 21 U.S.C. 845b (1988). J.A. 16-21. In a written plea agreement, petitioner agreed to plead guilty to the drug conspiracy charged in the indictment, and the government agreed to dismiss the remaining charges and to move for a sentencing departure if petitioner provided substantial assistance to law enforcement. J.A. 80-91. In the plea agreement, petitioner acknowledged that he had personally participated in activities of the conspiracy involving from 15 to 50 kilograms of cocaine. J.A. 81.

At the change-of-plea hearing, the government proffered that petitioner and others moved to York, Pennsylvania, in the spring of 1989, for the purpose of selling cocaine. The government further proffered that the group subsequently obtained from 15 to 50 kilograms of cocaine in the New York City area, transported it to York, and distributed it. J.A. 31-32. The district court accepted petitioner's plea of guilty to drug conspiracy. J.A. 33-34.

After his guilty plea, petitioner was interviewed by government investigators. During that interview, however, petitioner falsely denied that he knew one of the

other participants in the conspiracy. J.A. 41-43, 53-54. The government did not file a motion for a downward departure on petitioner's behalf.

On April 22, 1992, the court held a sentencing hearing. Although the Sentencing Guidelines provided for a sentencing range of from 292 to 365 months of imprisonment, the district court imposed a sentence of 274 months.[2] J.A. 56. After imposing sentence, the district court failed to notify petitioner of his right to appeal his sentence. J.A. 35-57. Petitioner did not take a direct appeal. J.A. 193.

2. On December 10, 1996, petitioner filed a pro se motion under 28 U.S.C. 2255 (Supp. II 1996) to set aside his conviction and sentence. J.A. 9, 58-67. In that motion, petitioner alleged that his counsel had been ineffective in numerous respects. In particular, petitioner alleged that his counsel had failed to file a notice of appeal even though petitioner had asked that one be filed. J.A. 63, 65. The district court appointed new counsel to represent petitioner, and new counsel filed an amended motion adding the claim that the district court had violated Rule 32(a)(2) of the Federal Rules of Criminal Procedure by failing to inform

[2] In sentencing petitioner below the Guidelines range, the district court relied on United States Sentencing Guidelines Manual § 5G1.3 (1992), which applies to defendants who are subject to an undischarged term of imprisonment for a different offense. Petitioner committed the present offense while on bail pending resolution of New Jersey state narcotics charges. Before he was sentenced in the present case, petitioner received a ten-year sentence for the New Jersey offenses. Although the district court could have made some or all of petitioner's federal sentence concurrent with his state sentence under Section 5G1.3, the court instead imposed a consecutive sentence and then departed below the minimum sentence specified by the Guidelines. J.A. 173-174.

petitioner of his right to appeal his sentence.[3] J.A. 92-93. Petitioner did not allege, however, that he had been unaware of his right to appeal, or that the district court's omission prejudiced him in any way. *Ibid.*

At an evidentiary hearing on the motion, both petitioner and his former counsel, Rex Bickley, testified about the circumstances surrounding petitioner's failure to take a direct appeal. Bickley testified that, on the day of the sentencing hearing, he informed petitioner of his right to appeal, offered to represent petitioner, and explained that the court would appoint him for that purpose. J.A. 104, 123. Bickley further testified that petitioner declined to take an appeal, however, preferring instead to cooperate with the government in an attempt to reduce his sentence. J.A. 104-105, 123-124. Bickley concurred in that decision, viewing as minimal the likelihood that petitioner would prevail if an appeal were taken. J.A. 76-77. In the year after petitioner's sentencing, petitioner wrote Bickley five or six letters indicating that petitioner wanted to provide information to the government. In none of those letters did petitioner express any desire to take an appeal. J.A. 125-126.

Petitioner testified at the hearing that he informed Bickley at the moment of sentencing that he wanted to appeal. J.A. 139, 153. Petitioner also testified that, shortly after sentencing, a fellow prisoner wrote a letter to Bickley reiterating petitioner's request that a timely appeal be taken. J.A. 138-139, 156-160. Petitioner produced what he claimed was a copy of the letter and testified that his fellow prisoner's wife had sent the original letter to Bickley. J.A. 157-158, 166-

[3] The text of Rule 32(a)(2), as it existed at the time of petitioner's sentencing, is reprinted *supra*, p. 2.

167. Bickley testified that he never received such a letter. J.A. 163-164.

3. The district court denied petitioner's Section 2255 motion. J.A. 168-187. It held that the failure to advise petitioner of his right to appeal, as required by Rule 32(a)(2), provided no basis for collateral relief. J.A. 184. Because petitioner knew about his right to appeal, the court explained, the court's failure to advise him of that right did not "result[] in a complete miscarriage of justice or in a proceeding inconsistent with the rudimentary demands of fair procedure." *Ibid.* (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (internal quotation marks omitted)). The district court also rejected petitioner's other claims for relief.[4] J.A. 179-186. Petitioner sought a certificate of appealability, limited to the Rule 32 issue, and the district court granted the certificate. J.A. 188-191.[5]

4. The court of appeals affirmed. J.A. 192-195. Citing *McCumber* v. *United States*, 30 F.3d 78, 79 (8th Cir. 1994), it held that the failure to inform a defendant

[4] In rejecting petitioner's other claims for relief, the district court credited petitioner's counsel rather than petitioner on a number of points on which their testimony differed. For example, the district court found that petitioner had intentionally forgone an appeal in the hope of obtaining a sentencing reduction by providing substantial assistance. J.A. 180-181. The court also discredited petitioner's claims that counsel had never explained the plea agreement to petitioner and had promised that petitioner would receive only a ten-year sentence. J.A. 182-183.

[5] The government acquiesced in the granting of a certificate of appealability. J.A. 189. In fact, however, the district court erred in issuing a certificate. A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) (Supp. II 1996), and the Rule 32 error on which petitioner sought the certificate is not of constitutional dimension.

of his appellate rights is "harmless error" if the government can show by clear and convincing evidence that the defendant knew of his right to appeal. J.A. 194-195. In the present case, the court held, "it is clear that [petitioner] knew of his right to appeal," "[w]ithout even crediting [his] former counsel's testimony." J.A. 195. The court therefore concluded that the sentencing court's failure to advise petitioner of that right was "harmless and thus does not justify collateral attack by [petitioner]." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner seeks collateral relief pursuant to 28 U.S.C. 2255 (Supp. II 1996), on the ground that the district court that sentenced him failed to advise him of his right to appeal, as required by Rule 32 of the Federal Rules of Criminal Procedure. This Court has held, however, that "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (quoting *Hill* v. *United States*, 368 U.S. 424, 429 (1962)). Rather, a defendant can obtain collateral relief based on such an error only if he can show that the error "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (quoting *Hill*, 368 U.S. at 428). Petitioner cannot make such a showing.

A. It is undisputed that petitioner knew that he had the right to appeal. Thus, petitioner's claim is that the district court failed to advise him of something that he independently knew. This Court's decision in *Timm-*

reck establishes that such a claim provides no basis for collateral relief. In *Timmreck*, the district court failed to advise the defendant that he would have to serve a special parole term of at least three years if he pleaded guilty. Although that omission was inconsistent with the requirements of Rule 11 of the Federal Rules of Criminal Procedure, the Court held that the defendant was not entitled to collateral relief, because he did "not argue that he was actually unaware of the special parole term." 441 U.S. at 784. Collateral relief is similarly unavailable in the present case, because petitioner has never even claimed that he was actually unaware of his right to appeal, and the evidence establishes that he was aware of that right.

Even on direct appeal, procedural errors that do not result in prejudice normally provide no basis for reversal of a criminal conviction. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). It necessarily follows that such errors cannot justify overturning final convictions on collateral review. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

B. Petitioner's arguments in support of a rule of per se collateral relief are without merit. Although Rule 32 is intended to protect defendants' right to appeal, this Court held in *Timmreck* that the violation of a procedural rule intended to protect important rights does not justify collateral relief in the absence of prejudice.

Nor is there merit to petitioner's claim (Br. 20, 22) that a rule of per se collateral relief is justified because any inquiry into prejudice will "[r]isk[] [u]nreliable [r]esults" and cause "excessive litigation." Those concerns do not apply where, as in the present case, it is undisputed that the defendant knew of his right to appeal. In such cases there is no risk of an inaccurate determination of prejudice, and no need for any, much less "excessive," litigation of the issue. Rather, the district court can and should simply dismiss such claims without a hearing.

More generally, a proper balance of interests requires an analysis of prejudice before a court may overturn a final judgment on collateral review. Courts are capable of making accurate determinations of prejudice, and routinely do so before granting collateral relief.

Although a rule of per se collateral relief would obviate the need for an inquiry into prejudice, it would come only at the cost of requiring courts, even where the lack of prejudice was clear, to vacate final judgments, resentence defendants, and reinstate their appeals. Moreover, even the courts that purport to adhere to a rule of per se collateral relief have carved out exceptions where they view it as sufficiently clear that the violation of Rule 32 was not prejudicial. Continued litigation over the proper scope of those exceptions would erode much of the claimed efficiency of petitioner's approach.

C. This Court's decision in *Rodriquez* v. *United States*, 395 U.S. 327 (1969), does not support a rule of per se collateral relief. The Court in *Rodriquez* held that, on the particular record before it, the district court's failure to advise the defendant of his right to appeal "effectively deprived [him] of his right to appeal." *Id.* at 332. That case-specific holding that prejudice was shown provides no support for petitioner's claim that the failure to advise a defendant of the right to appeal justifies collateral relief without a showing of

prejudice. This Court's subsequent decision in *Timmreck* forecloses the latter claim.

ARGUMENT

BECAUSE PETITIONER KNEW THAT HE HAD THE RIGHT TO APPEAL, THE DISTRICT COURT'S FAILURE TO ADVISE HIM OF THAT RIGHT PROVIDES NO BASIS FOR COLLATERAL RELIEF

Petitioner seeks collateral relief pursuant to 28 U.S.C. 2255 (Supp. II 1996), on the ground that the district court that sentenced him in 1992 failed to advise him of his right to appeal, as required by Rule 32 of the Federal Rules of Criminal Procedure. It is well settled, however, that Section 2255 does "not encompass all claimed errors in conviction and sentencing." *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). Rather, "unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited. * * * [A]n error of law does not provide a basis for collateral attack unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Ibid.* (quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). See also *Reed* v. *Farley*, 512 U.S. 339, 348 (1994) (opinion of Ginsburg, J.); *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (denying relief under Section 2255 because claimed error did not "result[] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure'") (quoting *Hill*, 368 U.S. at 428). Petitioner's claim for collateral relief rests solely on a violation of a rule of procedure, and petitioner therefore rightly concedes (Br. 14) that he could obtain relief only if he could meet the "demanding legal standard" imposed by *Timmreck* and *Hill*. Petitioner cannot meet that standard.

A. The District Court's Failure To Advise Petitioner Of His Right To Appeal Did Not Result In A Complete Miscarriage Of Justice Or In A Proceeding Inconsistent With The Rudimentary Demands Of Fair Procedure

1. Petitioner has never contended that he was unaware of his right to appeal at the time of his sentencing. To the contrary, his Section 2255 motion, and his testimony at the hearing on that motion, make clear that he was aware of that right. See, *e.g.*, J.A. 63, 65, 138-139. Petitioner's trial counsel also testified that he informed petitioner of the right to appeal. J.A. 104-105. Given the lack of any factual dispute on the point, the district court and the court of appeals appropriately decided the case on the premise that petitioner knew that he had the right to appeal.[6] J.A. 184, 195.

Thus, petitioner's claim is that the district court committed error by failing to tell him something that he independently knew. There is no basis for concluding that such an error "result[s] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" *Timmreck*, 441

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[6] There was a factual dispute between petitioner and his former counsel about whether petitioner sought to exercise his right to appeal or instead chose to forgo an appeal. Compare, *e.g.*, J.A. 104-105 with, *e.g.*, J.A. 138-139. The district court credited counsel's testimony that petitioner decided to forgo any appeal, and therefore rejected petitioner's claim that his counsel was ineffective for failing to file a notice of appeal. J.A. 180-186. The factual dispute about whether petitioner wanted to exercise his right of appeal, however, is not at issue here; and, indeed, the premise of the claim that petitioner's counsel thwarted petitioner's desire to appeal is that petitioner knew that he had such a right.

U.S. at 784 (quoting *Hill*, 368 U.S. at 428). As the Seventh Circuit has explained, "[a] district court's failure to tell the defendant about his right to appeal does not authorize relief of any kind if the defendant knew he could appeal. * * * Not being told in court what your lawyer told you beforehand, or what you knew already, is no constitutional injury." *United States* v. *Mosley*, 967 F.2d 242, 244 (1992).

This Court's cases establish that, in the absence of prejudice, a "failure to comply with the formal requirements of" a rule of procedure provides no basis for collateral relief. *Hill*, 368 U.S. at 429. In *Hill*, the defendant sought collateral relief on the ground that the sentencing judge had violated Rule 32(a) of the Federal Rules of Criminal Procedure, by failing expressly to afford the defendant an opportunity to make a statement before the court imposed sentence. 368 U.S. at 425. The Court held that "the failure to follow the formal requirements of Rule 32(a) is not of itself an error that can be raised by collateral attack." *Id.* at 426. The Court noted that the defendant had not been affirmatively denied the right to speak and did not claim any prejudice from the violation. *Id.* at 429. In fact, there was "no claim that the defendant would have had anything at all to say if he had been formally invited to speak." *Ibid.* Under the circumstances, the Court held, collateral relief was unavailable. *Ibid.*

Similarly, the defendant in *Timmreck* sought collateral relief on the ground that the district court had violated Rule 11 of the Federal Rules of Criminal Procedure, by not informing him at the time of his guilty plea that the offense to which he was pleading guilty required imposition of a special parole term of at

least three years.[7] 441 U.S. at 781-782. The defendant in *Timmreck*, however, did "not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule." *Id.* at 784. Because there had been no "showing of special prejudice to the defendant," this Court held that the defendant was not entitled to collateral relief. *Id.* at 783.

Timmreck and *Hill* foreclose petitioner's claim. Like the defendants in those cases, petitioner seeks collateral relief based solely upon a procedural error. Yet, like those defendants, petitioner can show no prejudice from the error.[8] A procedural error that caused no harm provides no ground upon which to overturn a final conviction. See *Davis* v. *United States*, 417 U.S. 333, 346 (1974) ("'[C]ollateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was

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[7] Rule 11 establishes procedures governing the entry of guilty pleas. It requires that, before accepting a guilty plea, the district court address the defendant in open court, advise the defendant of his rights and of the consequences of pleading guilty, and ensure that the plea is voluntary. Fed. R. Crim. P. 11.

[8] In this case, the court of appeals suggested that the government bore the burden of establishing the absence of prejudice by clear and convincing evidence. J.A. 194-195. To the contrary, the burden of alleging and establishing prejudice is properly placed upon the defendant seeking collateral relief on the ground of a violation of a rule of procedure. See *Timmreck*, 441 U.S. at 783-785; *Hill*, 368 U.S. at 429.

prejudiced by the asserted technical error.") (quoting *Hill*, 368 U.S. at 429).[9]

Timmreck is particularly relevant. The error in *Timmreck* is of the same character as the error in the present case: the district court failed to provide a defendant with required information relevant to the defendant's exercise of his rights. And collateral relief was denied in *Timmreck* for the same reason that it should be denied here: neither defendant alleged that he was unaware of the information that the district court omitted to provide, see *Timmreck*, 441 U.S. at 784, and so neither defendant was prejudiced.

Petitioner (Br. 19-20) and his *amicus* (National Association of Criminal Defense Lawyers (NACDL) Br. 25) attempt to distinguish *Timmreck* on the ground that the defendant in *Timmreck* could have raised his claim on direct appeal but failed to do so, whereas defendants who are not advised of their right to appeal, and who are not otherwise aware of that right, "cannot be expected to file appeals." Pet. Br. 19. The proposed distinction is unavailing. Although the more demanding standard applicable on collateral review rests in part on the notion that defendants should generally raise their claims on direct appeal, see, *e.g.*, *Timmreck*,

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[9] Accord *Tress* v. *United States*, 87 F.3d 188, 189-190 (7th Cir. 1996); *United States* v. *Garcia-Flores*, 906 F.2d 147, 148-149 (5th Cir. 1990); *United States* v. *Drummond*, 903 F.2d 1171, 1173-1175 (8th Cir. 1990), cert. denied, 498 U.S. 1049 (1991). Although several circuits have adopted a rule of per se collateral relief, they have done so without discussing this Court's decisions in *Timmreck* and *Hill*. See *Thompson* v. *United States*, 111 F.3d 109, 110-111 (11th Cir. 1997); *United States* v. *Sanchez*, 88 F.3d 1243, 1246-1247 (D.C. Cir. 1996); *Reid* v. *United States*, 69 F.3d 688, 689-690 (2d Cir. 1995); *United States* v. *Benthien*, 434 F.2d 1031, 1032-1033 (1st Cir. 1970).

441 U.S. at 784, the heightened collateral-review standard reflects other important finality concerns as well. See *ibid.* This Court has therefore applied that standard to a claim that could not have been raised on direct appeal. See *Addonizio*, 442 U.S. at 184-190 (applying "miscarriage of justice" standard to claim that post-sentencing change in parole policy unlawfully extended defendant's sentence beyond period intended by sentencing judge). In any event, petitioner knew of his right to appeal, and his failure to appeal can therefore not be excused on the ground of ignorance.

2. Even on direct appeal, a procedural error that does not result in prejudice to the defendant normally provides no basis for reversal of a criminal conviction. See 28 U.S.C. 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

A failure to provide information to a defendant who already has that information from another source is a typical example of harmless error. Thus, a defendant who has pleaded guilty may not obtain reversal of his conviction on direct appeal on the ground that the district court failed to conduct part of the colloquy required by Rule 11, when the record indicates that the defendant was aware of the omitted information. See, *e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322-1323 (D.C. Cir. 1995) (failure to advise defendant of potential fine at time of guilty plea was harmless, because defendant was advised of potential fine at arraignment and in pre-sentence report); *United States* v. *Henry*, 893 F.2d 46, 48 (3d Cir. 1990) (failure to advise defendant of mini-

mum term of supervised release was harmless, because plea agreement, which defendant signed and acknowledged he understood, informed defendant of minimum term); *United States* v. *Peden*, 872 F.2d 1303, 1307 (7th Cir. 1989) ("a district court's failure to comply with Rule 11(c)(1) is harmless error where the record establishes that the defendant nevertheless understood the charges against him and their direct consequences").[10]

Those cases make clear that, in the absence of prejudice, the failure to give defendants required advice does not justify overturning convictions on direct appeal. It necessarily follows that, in the absence of prejudice, such a failure cannot justify overturning final convictions on collateral review. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

[10] In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Court exercised its supervisory authority to require reversal in any case in which the district court accepted a plea of guilty without fully adhering to the requirements of Rule 11. The specific holding of *McCarthy* was overturned by the 1983 addition of Rule 11(h), which provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." See, *e.g.*, *United States* v. *DeFusco*, 949 F.2d 114, 117 (4th Cir. 1991), cert. denied, 503 U.S. 997 (1992); *United States* v. *Parra-Ibanez*, 936 F.2d 588, 598 n.24 (1st Cir. 1991); *United States* v. *Drummond*, 903 F.2d 1171, 1173 & n.5 (8th Cir. 1990), cert. denied, 498 U.S. 1049 (1991). In addition, this Court's subsequent cases have repudiated the general approach reflected in *McCarthy*. See, *e.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.").

B. A Rule Of Per Se Collateral Relief Is Inconsistent With Sound Principles Of Collateral Review

Petitioner contends that a district court's failure to advise a defendant of the right to appeal is "an omission inconsistent with the rudimentary demands of fair procedure." Br. 14 (quoting *Hill*, 368 U.S. at 428). Such a failure, petitioner further contends, "justifies post-conviction relief as a matter of law," even if the failure was not prejudicial in any way. Br. 24. Petitioner's contention is unsound.

1. Petitioner notes (Br. 17-18) that Rule 32, which originally required only that unrepresented defendants be advised by the court of their right to appeal, was amended in 1966 to require that represented defendants as well be advised of their right to appeal. Petitioner further notes (Br. 17-19) that the 1966 amendment necessarily reflects the conclusion that defense attorneys do not always adequately advise defendants of their appellate rights, and that those rights should therefore be further protected by requiring that the court advise defendants of them. Because the right to appeal is fundamental, petitioner concludes (Br. 18), "the rule which protects that [right] is fundamental, and should be treated as a rudimentary demand of fair procedure." Petitioner's conclusion does not follow from his premises.

The question in this case is not whether it is sound policy to require that the court advise defendants of their right to appeal; Rule 32 requires such advice, and a district court's failure to comply with that Rule amounts to error. Rather, the question is whether such an error justifies collateral relief when the purpose of

the Rule is met, because the defendant did know of his right to appeal. This Court's decision in *Timmreck* establishes that collateral relief is unavailable in such circumstances.

In *Timmreck*, the district court failed to advise the defendant that pleading guilty would subject him to a mandatory special parole term of three years. 441 U.S. at 781-782. This Court implicitly assumed that the district court's omission was a violation of Rule 11, which at the time of the defendant's guilty plea required that the district court "address the defendant personally" to determine that a guilty plea was "made voluntarily with understanding of * * * the consequences of the plea." *Id.* at 781 n.1 (quoting Fed. R. Crim. P. 11 (1966)). Rule 11 was clearly intended to protect the important constitutional rights that a defendant waives by entering a guilty plea, including the rights to be tried by a jury, to confront one's accusers, and to assert the privilege against compelled self-incrimination. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969). Rule 11 also necessarily reflects the conclusion that defendants are not always adequately advised of those rights by their attorneys, and that those rights should therefore be further protected by requiring the court to advise defendants of them. Nevertheless, the Court held in *Timmreck* that collateral relief was not justified, because there was no suggestion that the failure to comply with the procedural requirements of Rule 11 was prejudicial to the defendant.

Timmreck establishes that the violation of a procedural rule intended to protect important constitutional rights does not justify collateral relief in the absence of

prejudice.[11] It follows *a fortiori* that, in the absence of prejudice, collateral relief is not justified by a violation of a procedural rule intended to protect the right to appeal, which is not of constitutional dimension. See *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Abney* v. *United States*, 431 U.S. 651, 656 (1977).

2. Petitioner also contends (Br. 20, 22) that a rule of per se collateral relief is justified because any inquiry into prejudice will "[r]isk[] [u]nreliable [r]esults" and cause "excessive litigation." In this case, of course, it is undisputed that petitioner knew of his right to appeal. Cases such as this present no risk of an inaccurate determination of prejudice and do not require any, much less "excessive," litigation of the issue. Rather, the district court can and should simply dismiss such claims without a hearing.[12]

a. More generally, the risk of an inaccurate determination of prejudice is no greater here than in the many other settings in which courts inquire into pre-

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[11] See, *e.g.*, *United States* v. *Pollard*, 959 F.2d 1011, 1020 (D.C. Cir.) (although district court violated Rule 11 by failing to inquire into whether guilty plea was voluntary, collateral relief under Section 2255 is not warranted, because defendant failed to establish prejudice), cert. denied, 506 U.S. 915 (1992); *Harvey* v. *United States*, 850 F.2d 388, 394-395 (8th Cir. 1988) (same where district court violated Rule 11 by failing to advise defendants of nature of charges against them).

[12] In the present case, for example, the district court could properly have rejected petitioner's Rule 32 claim without a hearing, because it was undisputed in the pleadings that petitioner was aware of his right to appeal and therefore was not prejudiced by the district court's failure to advise him of that right. There was a need for a hearing, however, to resolve the factual dispute over the quite different question—relevant only to an issue not before the Court—whether petitioner sought to exercise his right to appeal or instead decided not to appeal. See *supra*, pp. 4-6.

judice. The well-established principle that convictions should not be reversed in the absence of prejudice, whether on direct appeal or on collateral review, is premised on the view that courts can reliably conduct that inquiry. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a); *Timmreck*, 441 U.S. at 783-784. As this Court has explained:

> [W]hen courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibility, becoming instead impregnable citadels of technicality." * * *
>
> [I]t is the duty of a reviewing court * * * to ignore errors that are harmless * * *. The goal * * * is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error."

United States v. *Hasting*, 461 U.S. 499, 509 (1983) (quoting R. Traynor, *The Riddle of Harmless Error* 14, 81 (1970)) (internal quotation marks omitted).

It is true, as petitioner notes (Br. 20, 21-22), that the question of prejudice in the present context will turn in some cases on an assessment of "the conflicting recollections of the defendant and the former attorney," and that the former attorney may have a motive to testify that he gave proper advice to his client. But that is true in other settings as well. For example, an assessment of the testimony of the defendant and his original counsel is often highly relevant when a defendant who pleaded guilty claims that he was prejudiced by a district court's failure to advise him of his rights as required by Rule 11. See, *e.g.*, *Harvey* v. *United States*, 850 F.2d 388, 396-397 (8th Cir. 1988) (rejecting defendants' claim that district court's failure

to advise them of nature of charges was prejudicial, relying in part on counsels' testimony that they discussed charges with defendants). The same is true in cases in which a defendant alleges that counsel was ineffective for failing to file a notice of appeal. See, *e.g.*, *Castellanos* v. *United States*, 26 F.3d 717, 720 (7th Cir. 1994) (where defendant alleged that counsel was ineffective for failing to file notice of appeal, court remands case for factual determination as to whether defendant requested that appeal be taken). Thus, contrary to petitioner's suggestion, it is neither inappropriate nor infeasible for courts to inquire on collateral review into whether a district court's failure to advise a defendant of the right to appeal was prejudicial.

b. Petitioner's invocation of judicial efficiency fares no better. First, no decision of this Court supports the idea that federal courts may properly overturn final judgments on collateral review if they conclude that it would be more convenient to do that than to conduct the inquiry, mandated by *Timmreck* and *Hill*, into whether the error at issue was prejudicial to the defendant. Second, even if sufficiently strong considerations of efficiency could justify the setting aside of final judgments on collateral review, petitioner has failed to make a case for that conclusion here.

There is no suggestion that district courts routinely overlook Rule 32's requirements. In the unusual case in which there is "[a]n unwitting judicial slip," *Reed*, 512 U.S. at 349 (opinion of Ginsburg, J.), a hearing will not be necessary to determine prejudice unless prejudice is alleged and factually disputed. Under a rule of per se collateral relief, in contrast, the district courts would be required to grant collateral relief in every case (subject to certain ill-defined exceptions, see *infra*, pp. 23-24), by vacating defendants' convictions and reimposing sen-

tence. See, *e.g.*, *Thompson* v. *United States*, 111 F.3d 109, 111 (11th Cir. 1997) (remedying violation of Rule 32 by vacating sentence and remanding for reimposition of sentence, so that defendant could then appeal). In addition, the courts of appeals would be required to consider and decide the merits of the claims that defendants raised in their ensuing appeals. Resolution of those appeals would entail a substantial expenditure of judicial resources.[13] That expenditure is unjustified, moreover, where the defendant knew that he had the right to appeal and elected not to do so. Such a defendant should not be given the windfall of a second chance to appeal simply because the district court did not advise him of a right of which he was independently aware.

In sum, the choice is between petitioner's rule, which (subject to certain exceptions, see *infra*, pp. 23-24), treats violations of Rule 32 as invariably requiring vacation of final judgments, resentencing, and reinstatement of defendants' appeals, and a rule that, consistent with *Timmreck*, requires such relief only if prejudice is shown and requires a hearing to determine prejudice only if prejudice is disputed. Even if the choice between those rules could properly be made on the basis of considerations of judicial efficiency,

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[13] That is true even where, as here, any reinstated appeal would be limited to sentencing issues. Rule 32 does not require that defendants who plead guilty be advised of the right to take a direct appeal challenging the validity of the adjudication of guilt. Rather, it requires only that defendants who plead guilty be advised of the right to appeal the *sentence*. Fed. R. Crim. P. 32(a)(2). Any remedy for a violation of that requirement should be tailored to the violation, and thus should be limited to reinstatement of an appeal challenging the sentence. Sentencing appeals under the Guidelines, however, can be very resource-intensive.

petitioner cannot carry the burden of showing that his approach would better serve efficiency interests.

c. Petitioner's claim that a rule of per se collateral relief would conserve judicial resources is further undermined by his concession (Br. 11) that even those courts of appeals that purport to apply such a rule make exceptions where, in their view, the violation of Rule 32 was clearly not prejudicial. For example, courts deny relief where the defendant takes a direct appeal notwithstanding the lack of advice, see, *e.g.*, *United States* v. *Chang*, 142 F.3d 1251, 1251-1252 (11th Cir. 1998); *United States* v. *Bygrave*, 97 F.3d 708, 709-710 (2d Cir. 1996); where the defendant validly waived his right to appeal in a plea agreement, see, *e.g.*, *Valente* v. *United States*, 111 F.3d 290, 292-293 (2d Cir. 1997); *Everard* v. *United States*, 102 F.3d 763, 765-766 (6th Cir. 1996), cert. denied, 519 U.S. 1139 (1997); *United States* v. *DeSantiago-Martinez*, 38 F.3d 394, 395-396 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); and where the defendant was advised of his right to appeal on the record at a proceeding sufficiently close in time to sentencing, see, *e.g.*, *Hoskins* v. *United States*, 462 F.2d 271, 273-275 (3d Cir. 1972) (collateral relief denied, despite district court's failure to advise defendant of right to appeal at time of sentencing, because district court had advised defendant of right to appeal approximately seven weeks earlier, at close of trial).

If petitioner's submission were accepted, its apparent ease of application would likely dissolve in disputes over whether further exceptions should be recognized. Courts would likely have to decide whether collateral relief would be required, without regard to prejudice, if the district court failed to advise the defendant at the time of sentencing that he had a right to appeal, but (1) the defendant was advised on the record of his rights by

his defense attorney, the prosecutor, or the courtroom clerk; (2) the defendant made statements on the record indicating his awareness of his right to appeal; or (3) the defendant was advised of his right to appeal on the record at some other proceeding removed in time from sentencing, compare, *e.g.*, *Hoskins*, 462 F.2d at 273-275 (denying collateral relief where defendant was advised of right to appeal at close of trial, seven weeks before sentencing), with, *e.g.*, *Farries* v. *United States*, 439 F.2d 781, 781-782 (3d Cir. 1971) (granting collateral relief where defendant was advised of right to appeal at first sentencing proceeding, which was three-and-a-half months before second sentencing proceeding).

It would hardly conserve judicial resources to adopt a rule that would require courts to struggle with such issues. In addition, it makes little sense to announce a rule of per se collateral relief without regard to prejudice, but to carve out exceptions to that rule when the lack of prejudice is clear. Far more sensible is the approach dictated by *Timmreck*: a defendant seeking collateral relief on the basis of a violation of a procedural rule is not entitled to relief unless he can establish that the violation "resulted in 'a complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" 441 U.S. at 784 (quoting *Hill*, 368 U.S. at 428).

C. *Rodriquez* v. *United States* Does Not Dispense With A Showing Of Prejudice

Amicus NACDL cites this Court's decision in *Rodriquez* v. *United States*, 395 U.S. 327 (1969), as suggesting "a narrow scope for harmless error analysis." Br. 18. *Rodriquez*, however, does not support a rule of per se collateral relief. The question presented in *Rodriquez* was whether a defendant who was deprived

of his right to appeal by his counsel's failure to file a timely notice of appeal was required to "show some likelihood of success on appeal" in order to obtain collateral relief. 395 U.S. at 330. The Court held that no such showing is required. *Ibid.*

The government also argued in *Rodriquez*, however, that the case should be remanded for further proceedings to determine the reason for counsel's failure to file a notice of appeal. 395 U.S. at 331. The Court concluded that no remand was required, noting that "[t]his issue was not present in this case when certiorari was granted and we do not think it is present now." *Ibid.* Observing that it "d[id] not see how further delay and further prolonged proceedings would serve the cause of justice," the Court concluded that it was "'just under the circumstances,' 28 U.S.C. § 2106, for [the Court] to dispose of [Rodriquez's] arguments finally at this stage," because the record before the Court sufficed to establish that Rodriquez had been effectively denied his right to appeal. *Id.* at 331. Specifically, the Court pointed out that Rodriquez's counsel had indicated to the district court immediately after sentencing that Rodriquez wanted to proceed *in forma pauperis*, and "unless an appeal was contemplated, there would be no reason to make such a motion." *Id.* at 332. Because the same motion "should have put the trial judge on notice that [Rodriquez] would be unrepresented in the future," the Court held, the trial judge was obliged to advise Rodriquez of his right to appeal. *Id.* at 331-332 & n.3 (noting that rule then in effect required notice of appellate rights only if defendant was unrepresented). Under the circumstances, the Court concluded, the trial judge's failure to advise Rodriquez of his right to appeal "effectively deprived [Rodriquez] of his right to appeal." *Id.* at 332.

In *Rodriquez*, the Court rejected what it viewed as a belated and unnecessary request that the record be expanded, and held that the record before it adequately supported the conclusion that Rodriquez had been deprived of his right to appeal. That case-specific holding provides no support for the quite different claim here—*i.e.*, that the failure to advise a defendant of the right to appeal justifies collateral relief without need for any further inquiry into whether the failure was prejudicial. Indeed, the Court in *Rodriquez* concluded that no hearing was necessary precisely because it believed it apparent that the defendant in that case wanted to appeal and was effectively denied his right to appeal, because he was no longer represented by counsel and was not advised by the court of his appellate rights. *Rodriquez* is thus entirely consistent with this Court's subsequent holding in *Timmreck* that a showing of prejudice is a requirement for collateral relief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1998

MANUEL DEJESUS PEGUERO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITIONER'S REPLY BRIEF

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This Court granted certiorari to resolve a split among the circuits regarding the remedy to be applied when a district court fails to notify a defendant of his appellate rights, as required by former Rule 32(a)(2) and current Rule 32(c)(5) of the Federal Rules of Criminal Procedure. Under the majority approach, the district court automatically reinstates the defendant's appellate rights; under the minority approach, the district court must first determine whether the defendant was prejudiced by the violation of the rule. The government has filed a brief raising several arguments in opposition to the majority rule and in favor of the minority rule. In this reply brief, the petitioner will respond to seven of the government's arguments.

1. Significance of the Problem

The government suggests that there is no significant lack of compliance with the rule. Specifically, the government argues, at page 21 of its brief, that the failure to warn a defendant of his right to appeal represents the "unusual case." Petitioner submits that the government has incorrectly assessed the scope of the problem.

Effective December 1, 1989, Criminal Rule 32(a)(2) was amended to require district courts to advise defendants that they had the right to appeal their sentences. Order of the Supreme Court, April 25, 1989, 490 U.S. 1135, 1140. Counsel has identified 31 published and unpublished cases which reflect that defendants

sentenced after December 1, 1989, were *not* advised of their appellate rights.[1]

This case law suggests that failure to follow the rule does not represent the "unusual case," but rather represents a recurring problem in the district courts.

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[1] *United States v. Campo*, 140 F.3d 415, 418 (CA2 1998); *Esposito v. United States*, 135 F.3d 111, 112 (CA2 1997); *Reid v. United States*, 69 F.3d 688, 689 (CA2 1995); *United States v. Ferraro*, 992 F.2d 10, 11 (CA2 1993); *United States v. Robinson*, 1998 WL 729244 (CA4 1998) (unpublished); *United States v. Hyden*, 1997 WL 130376 (CA4 1997) (unpublished); *United States v. Talbott*, 1996 WL 453469 (CA4 1996) (unpublished); *United States v. Shulman*, 1996 WL 245269 (CA4 1996) (unpublished); *United States v. Butler*, 938 F.2d 702, 703 (CA6 1991); *Tress v. United States*, 87 F.3d 188, 189 (CA7 1996); *Alvarez v. United States*, 1995 WL 63013 (CA7 1995) (unpublished); *United States v. Caswell*, 36 F.3d 29, 30 (CA7 1994); *United States v. Mosley*, 967 F.2d 242, 243 (CA7 1992); *McCumber v. United States*, 30 F.3d 78, 79 (CA8 1994); *Schultz v. United States*, 1993 WL 53168 (CA8 1993) (unpublished); *United States v. Beston*, 936 F.2d 361, 362 (CA8 1991); *Biro v. United States*, 24 F.3d 1140, 1141 (CA9 1994); *United States v. Stirn*, 1992 WL 367748 (CA9 1992) (unpublished); *United States v. Glantz*, 1991 WL 184821 (CA9 1991) (unpublished); *United States v. Brown*, 1994 WL 242224, note 4 (CA10 1994) (unpublished); *Thompson v. United States*, 111 F.3d 109 (CA11 1997); *United States v. Sanchez*, 88 F.3d 1243 (CADC 1996); *United States v. Sanchez*, 1998 WL 195727 (EDPA 1998); *Davis v. United States*, 1997 WL 115561 (SDNY 1997); *Cordero v. United States*, 1996 WL 635712 (EDNY 1996); *Gaeta v. United States*, 921 F.Supp. 864, 865 (D.Mass 1996); *Wlodyka v. United States*, 1994 WL 262910 (DNH 1994); *Esposito v. United States*, 1993 WL 513292 (NDNY 1993); *Hernandez v. United States*, 839 F.Supp. 140, 146 (EDNY 1993); *United States v. Osoria*, 1992 WL 209979 (EDLA 1992); *United States v. Padilla*, 1990 WL 33761 (SDNY 1990).

2. Burdens Associated with Resentencing

In opposing the majority rule, the government complains of the costs associated with conducting a second sentencing hearing (Government Brief, pg. 9). This concern is overstated, as the decision whether to conduct a second sentencing hearing is solely within the discretion of the district court.

A defendant's appellate rights may be reinstated without conducting a second sentencing hearing. Instead of conducting a hearing, the district court can simply issue an order vacating the original judgment, reimposing the original sentence, and directing the clerk to file a *pro se* notice of appeal. *Gaeta v. United States*, 921 F.Supp. 864, 866 (D.Mass 1996) (Tauro, C.J.). The procedure utilized in *Gaeta* was recently cited with approval in *United States v. Gipson*, 22 F.Supp.2d 46, 48 (WDNY 1998) (Larimer, C.J.).

It is true that in the appropriate case, the district court may choose to conduct a new sentencing hearing. Mr. Peguero has requested such a hearing in this case, so that he may attempt to secure a downward departure for post-conviction rehabilitation under *United States v. Sally*, 116 F.3d 76 (CA3 1997). He does not, however, seek to litigate any claim which could have been raised at the first sentencing hearing.

3. Effect on the Judgment of Conviction

The government suggests, at page 16 of its brief, that the petitioner is seeking to overturn a final conviction on collateral review. This suggestion is not accurate. Mr. Peguero seeks reinstatement of his right to pursue a

direct appeal, but is not challenging the judgment of conviction.

The government's analysis would be correct if the petitioner were pursuing a post-conviction challenge to the guilty plea colloquy under Criminal Rule 11. Collateral relief under Rule 11 would indeed overturn the judgment of conviction. By contrast, the remedy for a Rule 32(a)(2) violation is reinstatement of the right to direct appeal, a result which leaves intact the plea of guilty and the judgment of conviction.

4. Purpose of the Rule

While conceding that the district court violated Criminal Rule 32(a)(2), the government maintains that the judgment below should be affirmed because "the purpose of the Rule is met." (Government Brief at 17, 18). Petitioner disagrees. As noted by Judge Heaney of the Eighth Circuit, one of the purposes of adopting Rule 32(a)(2) was to "eliminate litigation over whether the defendant had been apprised of his appeal rights by his attorney." *United States v. Drummond*, 903 F.2d 1171, 1175 (CA8 1990) (Heaney, J., dissenting). "A bright-line rule requiring notice in all cases was adopted to eliminate persistent litigation over whether the defendant had been fully informed of his rights by his counsel." *Id.*

The judge's obligation to inform the defendant of his appellate rights assumes even greater importance in this era of guideline sentencing. Congress directed, as part of the Sentencing Reform Act of 1984, that Rule 32(a)(2) be amended to require the judge to advise the defendant of his right to appeal the sentence. Sentencing Reform Act of

1984, Public Law 98-473, Title II, Section 215(a), 98 Stat. 2014, 2015 (Oct. 12, 1984). "Congress enacted this amendment to rule 32 as part of its guidelines system of sentencing reform under which a right to appeal one's sentence has become more meaningful." *United States v. Ferraro*, 992 F.2d 10, 11 (CA2 1993). The purpose behind this amendment is better served by the majority rule, which strictly applies the requirement of appellate notification.

5. Efficiency

Under the majority rule, the right of direct appeal is reinstated where the existing district court record reflects that the judge did not warn the defendant of his or her appellate rights. Circuit courts have repeatedly recognized that this approach prevents excessive litigation and promotes judicial efficiency. *See Reid v. United States*, 69 F.3d 688, 689 (CA2 1995) ("We remain persuaded that the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2)"); *United States v. Sanchez*, 88 F.3d 1243, 1247 (CADC 1996) (same); *Thompson v. United States*, 111 F.3d 109, 111 (CA11 1997) (same).

The government asserts that the claimed benefits of judicial efficiency are overstated. They note several exceptions to the *per se* rule, and argue that application of these exceptions, along with consideration of additional exceptions, undermines the force of petitioner's efficiency argument (Government Brief at 23).

The courts of appeals have indeed recognized three exceptions to the rule of automatic reinstatement. The

Third Circuit will not grant relief where the record reflects that the district court judge advised the defendant of his appellate rights at a guilty plea hearing held close in time to the sentencing hearing. The Eleventh Circuit will not entertain a claim for relief where the defendant did, in fact, file a timely appeal. The Second and Sixth Circuits will deny relief where the defendant signed a plea agreement expressly waiving the right to appeal. (Brief of Petitioner at 11). All these exceptions have one thing in common – each can be applied on the existing record without the need for an evidentiary hearing. The government's rule, by contrast, will normally require an evidentiary hearing on the question of prejudice. Thus, even with certain narrow exceptions, the majority rule of automatic reinstatement best serves the interests of judicial efficiency.

6. Issues Not Presented

In the course of its brief, the government discusses two issues which were not preserved in the court below and which were not included within the grant of certiorari. The petitioner does not intend to formally rebut the government's argument on either issue. The two issues must be identified, however, lest petitioner's silence be misinterpreted as agreement with the government's arguments.

First, the government suggests, at page 22, footnote 13 of its brief, that a reinstated direct appeal should be limited to sentencing issues. Petitioner does not agree with this contention. *See Borman*, The Hidden Right to Direct Appeal From a Federal Plea Conviction, 64 Cornell

Law Review 319 (1979). Any objection to the issues presented on direct appeal should properly be decided, in the first instance, by the United States Court of Appeals for the Third Circuit.

Second, the government argues in its brief at page 6, footnote 5, that the district court erred in issuing a certificate of appealability. Petitioner disagrees with this contention, and notes that the government concurred in the application for certificate of appealability (J.A. 190). On the merits of the claim, the Third Circuit has observed that the wording of the certificate of appealability standard may simply reflect imperfect statutory draftsmanship. *Santana v. United States*, 98 F.3d 752, 757 (CA3 1996). Because this issue may be resolved through application of relevant principles of statutory construction, it is appropriate to permit further caselaw development in the district and circuit courts.

7. Harmless Error

The government argues that absent demonstrated prejudice, the petitioner cannot secure post-conviction relief. Petitioner disagrees, and asserts that relief may be granted as a matter of law when the violation of a rule of criminal procedure constitutes "an omission inconsistent with the rudimentary demands of fair procedure." *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 471 (1962).

In *Hill*, the defendant was not afforded the right of allocution, as required by the then-applicable version of Criminal Rule 32(a). This Court held that the error did not support post-conviction relief under 28 U.S.C. §2255. As stated in *Hill*:

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not *of itself* an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.

Hill v. United States, supra, 368 U.S. at 428, 82 S.Ct. at 471 (emphasis added). While concluding that a violation of Rule 32(a) was not "of itself" cognizable, the court left open the question of whether relief would be available "if a violation of Rule 32(a) occurred in the context of other aggravating circumstances . . . " *Id.*, 368 U.S. at 429, 82 S.Ct. at 472. In this regard, the Court stated as follows:

> It is to be noted that we are not dealing here with a case where the defendant was affirmatively denied an opportunity to speak during the hearing at which his sentence was imposed. Nor is it suggested that in imposing the sentence the District Judge was either misinformed or uninformed as to any relevant circumstances. Indeed, there is no claim that the defendant would have had anything at all to say if he had been formally invited to speak. Whether §2255 relief would be available if a violation of Rule 32(a) occurred in the context of other aggravating circumstances is a question we therefore do not consider. We decide only that such collateral relief is not available when all that is shown is a

> failure to comply with the formal requirements of the Rule.

Id., 368 U.S. at 429, 82 S.Ct. at 472.

The above-cited excerpts from *Hill* suggest that there are two ways to secure post-conviction relief where the defendant shows that there was a violation of a rule of criminal procedure. First, violation of the rule might "of itself" be cognizable if the violation "inherently results in a complete miscarriage of justice," or if the violation represents "an omission inconsistent with the rudimentary demands of fair procedure." In the alternative, even if the rule was not of inherent or rudimentary importance, the defendant would still have an opportunity to secure post-conviction relief if the rule violation was combined with prejudice to the defendant.

Mr. Peguero asserts that the failure to notify a defendant of his appellate rights is itself "an omission inconsistent with the rudimentary demands of fair procedure." He requests relief as a matter of law because Rule 32(a)(2) serves several interests which are properly classified as rudimentary demands of a fair system of criminal procedure.

Judicial notification of appellate rights protects the defendant's fundamental right to choose an appeal. It guards against the risk that the right of appeal will be inadvertently lost due to the ignorance of defendant or his counsel. It ensures that any decision to waive an appeal is made knowingly and voluntarily, with a full understanding of the right to a free attorney on appeal. Additionally, judicial notification is the only way to ensure that defendants are effectively notified of their

appellate rights. As stated in the Amicus Brief of the NACDL at page 17:

> This advice, as the Rule implicitly recognizes, must come from the district court itself, not from counsel. Coming from a neutral judge, it carries the weight of authority and impartiality. Coming from the decisionmaker whose rulings would be challenged, it removes any question of intimidation or fear of reprisal from the mind of an unsophisticated defendant. Coming from the court, it constitutes a guarantee of fairness, not tactical advice.

Finally, judicial notification of the right of appeal assumes enhanced importance under our current system of guideline sentencing. Months or even years of additional imprisonment may result from a misapplied adjustment, an error in arithmetic, or a simple failure to properly transpose numbers from a guideline grid. Given the frequent severity of guideline sentencing, it is essential that defendants be informed that they have the right to appeal their sentences. For all these reasons, the failure to notify defendants of their appellate rights should be deemed "an omission inconsistent with the rudimentary demands of fair procedure" justifying post-conviction relief as a matter of law.

CONCLUSION

Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be reversed, and that the case be remanded with instructions to reinstate petitioner's right to take a direct appeal.

Respectfully submitted,

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Date: December 29, 1998

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FILE COPY

No. 97-9217

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1998

MANUEL DEJESUS PEGUERO,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nationwide, nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. It has a membership of over 10,000 attorneys, and another 28,000 affiliate members in 80 affiliate organizations in 50 states. NACDL is recognized by the American Bar Association ("ABA") as an affiliate organization, and has full representation in the ABA's House of Delegates. NACDL has appeared before this Court on many occasions as *amicus curiae*.[2]

The primary interest of *amicus* NACDL is the maintenance of existing procedures that help to ensure that convicted criminal defendants who waive their direct appeals as of right do so knowingly.

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[1] All parties have consented to the appearance of NACDL in this matter, and letters of consent have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] A Westlaw search of the SCT database yielded 75 references to the National Association of Criminal Defense Lawyers in the capacity of *amicus curiae*. The references extended over a period of nearly 25 years; the most recent was *United States v. Balsys*, 118 S. Ct. 2218, 2223 n.3 (June 25, 1998).

STATEMENT OF THE CASE

On April 22, 1992, the United States District Court for the Middle District of Pennsylvania sentenced defendant Manuel DeJesus Peguero to imprisonment for 274 months (22 years and 10 months). (Joint App. 56-57.) The district court was required, when imposing sentence, to advise the defendant of his right to appeal this sentence. Fed. R. Crim. P. 32(a)(2).[3] The district court did not inform defendant Peguero of that right. (See Joint App. 22-57, *passim*.)

The ten-day period for filing a notice of appeal came and went. See Fed. R. App. P. 4(b). Defendant did not file a notice of appeal in that period, and did not request that the clerk of the court file one on his behalf. (See Joint App. 7-8, *passim*; 174.) There was no "excusable neglect" motion or order that might potentially have extended the appeal deadline up to thirty additional days. Fed. R. App. P. 4(b). Accordingly, there was no direct appeal in the case.

In August 1993, Peguero's mother wrote to the court, requesting that her son's sentence be reduced based on the erroneous advice of his counsel. In January 1995, Peguero filed a motion for free transcripts of his guilty plea and sentencing, stating that he wished to raise a challenge based upon the ineffective assistance of counsel and other sentencing-related grounds. On March 16, 1995, defendant followed up with a motion for "clarification" of the grounds for his sentence. All of these motions and requests were denied or dismissed. (Joint App. 8-9, 174-75)

On December 10, 1996, Peguero filed a *pro se* motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. § 2255. The motion asserted various grounds including ineffective assistance of counsel. (Joint App. 9, 58-67.) On April 23, 1997, the Federal Public Defender was appointed to represent Peguero in the § 2255 proceedings. (Joint App. 11.) The Public Defender, having evidently obtained the transcripts (Joint App. 11, docket item 68), supplemented the motion to include the district court's failure to advise Peguero of his appellate rights. (Joint App. 12, 92-93.)

The district court held an evidentiary hearing to determine, *inter alia*, whether Peguero's counsel had advised him of his right to appeal and whether he had voluntarily waived the direct appeal from his sentence. (Joint App. 95.) The court took testimony from Rex Bickley, Esq., Peguero's former counsel, who had already supplied a written statement

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[3] Rule 32(a)(2) was the effective provision as of April 22, 1992, the date of Mr. Peguero's sentencing. That version read:

> **"(2) Notification of Right to Appeal**
>
> After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant."

Effective December 1, 1994, the substance of this rule was transferred to Rule 32(c)(5), Fed. R. Crim. P., and reworded to some extent. The Advisory Committee Notes to the 1994 amendments state that, "[a]lthough the provision has been rewritten, the Committee intends no substantive change in practice." The parties do not seem to have disputed that the earlier version of the rule is applicable, but our arguments in this brief would apply to the current Rule 32(c)(5) as well.

to the Assistant U.S. Attorney, and from Peguero. (Joint App. 94-165.)

The district court denied the Section 2255 motion in a written opinion. The court found factually that, although it had not informed Peguero of his right to appeal, Peguero's attorney did so inform him. Peguero, the court found, chose to concentrate upon cooperating with the prosecutors in the hope of obtaining a reduced sentence pursuant to Fed. R. Crim. P. 35(b), instead of filing an appeal. (Joint App. 180-81, 184.) In so finding, the court resolved credibility questions against Peguero, because the cooperation strategy was plausible in light of the record; because defendant had delayed before bringing his Section 2255 claim before the court; and because the court's prior experience with the attorney, Mr. Bickley, led it to believe that Bickley had testified truthfully. (Joint App. 180-81.) As to the law, the court reasoned that a bare Rule 32 violation was not cognizable under Section 2255 unless it had resulted in a proceeding "inconsistent with the rudimentary demands of fair procedure."[4] That, in the district court's view, required more than a violation of the Rule; a defendant must "make [a] showing" that he was "actually unaware" of his right to appeal. (Joint App. 184, citing *United States v. Timmreck*, 441 U.S. 780, 784 (1979).) Because Peguero "knew about his right to appeal," the district court held, he could not collaterally attack the court's failure to inform him of his right to appeal as required by Rule 32(a)(2). (Joint App. 184.)

[4] The district court applied the same reasoning to a Rule 11 violation. The defendant had also challenged his guilty plea based on the District Court's failure to give seven of the warnings required by Rule 11, Fed. R. Crim. P.

The United States Court of Appeals for the Third Circuit affirmed in an unpublished panel Memorandum Opinion. (Joint App. 192.) In doing so, it cited the minority view of the Eighth Circuit that "a sentencing court's failure to inform a defendant of the right to appeal following a jury conviction is 'harmless error' if the government can show by clear and convincing evidence that the defendant knew of the right to appeal." (Joint App. 194-95, quoting *McCumber v. United States*, 30 F.3d 78, 79 (8th Cir. 1994).) The Third Circuit reviewed the record and concluded that "it is clear that Peguero knew of his right to appeal." (Joint App. 195.) Consequently, in the Third Circuit's view, the district court's denial of Section 2255 relief was not erroneous.

A petition to this Court for a writ of *certiorari* followed. That petition was granted on September 29, 1998.

SUMMARY OF ARGUMENT

Rule 32(a)(2), requires every district court, in every case, to advise convicted defendants of their right to appeal. It is a mandatory procedure, time-tested and experience-driven; it is also a prophylactic rule designed to protect the right to appeal. Where the district court fails to give the required advice, seven of the nine Circuits that have addressed the question have required resentencing, rather than making a case-by-case determination as to whether defendant learned of the right to appeal from some other source.

The right to appeal, while not Constitutionally based, is highly important and is fraught with Constitutional guarantees. The rationale of Rule 32(a)(2) is to ensure that any waiver of a right to appeal -- which is ordinarily

accomplished by silence or inaction -- is an informed one. Advice by the court is the minimum prerequisite for an informed waiver, and advice from other sources is not an adequate substitute.

There should not be a hearing to determine whether a violation of this bright-line rule was harmless, because the very purpose and rationale of this simple rule is to obviate such a hearing. Such hearings will often involve credibility contests between defendants and lawyers. Where the procedural right to appeal is at stake, it is unacceptable allocate the risk of inaccurate factfinding to defendants. But for the error of the district court, defendant's right to appeal would be on the record and indisputable.

Similarly, the high threshold for Section 2255 relief should not apply, because that doctrine presupposes that the defendant has already either exercised his right to appeal or waived it in accordance with the proper procedures.

Petitioner Peguero does not seek the reversal of a conviction or sentence. He asks only that the district court place him in the procedural position that he would and should have occupied absent the court's error.

ARGUMENT

A VIOLATION OF RULE 32(A)(2) SHOULD BE TREATED AS *PER SE* ERROR, REQUIRING RESENTENCING TO REINSTATE A DEFENDANT'S RIGHT TO APPEAL

A. The Error And The Issue

As to the underlying error there is no dispute. When the district court imposed sentence in this case, it omitted a basic procedural safeguard. Rule 32(a)(2) of the Federal Rules of Criminal Procedure imposes a simple duty directly upon each district judge: the judge must advise a sentenced defendant of the right to test the legality of his or her sentence on appeal.

In this case, that command was disregarded. The only question before this Court is whether that error is to be excused, or whether the district court must be required to comply with this simple procedural directive. Seven circuits hold that this Rule is a procedural requirement, the violation of which constitutes error *per se*. Under this *per se* view, the defendant must be resentenced (with the required advice of rights) in order to restart the running of the 10-day period to file a notice of appeal. Only two circuits hold to the contrary. In their view, the defendant is not entitled to any remedy unless he or she was subjectively unaware of the right to appeal.[5]

In the unpublished decision below, a panel of the Third Circuit, without discussing its own contrary published precedent, adopted the minority view of the Eighth Circuit. It upheld the denial of Section 2255 relief based upon the district court's finding that Peguero had been aware that he could appeal, even though the judge had failed to so inform him. This circumstance, in the Third Circuit's view,

[5] The Circuits were most recently canvassed by the Eleventh Circuit in *United States v. Thompson*, 111 F.3d 109, 110 (11th Cir. 1997). *Thompson* ascribes the majority view to "[s]ix circuits" other than the Eleventh.

rendered the omission "harmless error" and/or prevented it from rising to the level of a "miscarriage of justice." (Joint App. 196-97.)

Accepting the factual finding that Peguero was in fact aware that he could appeal, this case squarely presents the issue of whether the "*per se* error" or the "harmless error" approach to Rule 32(a)(2) is correct. *Amicus curiae* NACDL writes to stress that the *per se* error rule ensures the integrity of criminal processes, by making certain that waivers of the right to appeal are informed. It is a simple, universally applicable prophylactic safeguard that should be applied across the board, as intended.[6]

B. Rule 32(a)(2) Is A Waiver-Based Procedural Guarantee

Rule 32(a)(2) is a structural, procedural mandate intended (a) to ensure that convicted criminal defendants have ready, unfettered access to the appeals process; or, alternatively, (b) to ensure that convicted defendants who waive the right to an appeal do so knowingly. Both goals are important. It is salutary that criminal convictions be regularly tested by the appeals process, not only because error will sometimes be found, but because that testing process itself confers legitimacy on the vast majority of convictions. Alternatively, where a defendant, by inaction,

[6] The case law contains an exception for the defendant who timely files an appeal, but includes a claim that the district court failed to advise him of his right to appeal. Arguably the court may properly find the Rule 32(a)(2) violation harmless in this very limited context, because such a defendant has not missed his right to appeal, the very circumstance that renders the concept of harmlessness speculative or inapplicable. See *United States v. Chang*, 142 F.3d 1251 (11th Cir. 1998).

decides to forgo an appeal, that must be an informed decision.

Nothing requires a defendant to take an appeal -- just as nothing requires a defendant to plead not guilty, to employ counsel, to insist on a jury, or to testify on his or her own behalf. The right to an appeal, like other fundamental rights, may be waived.

A waiver is ordinarily defined as an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The particular nature of the waiver procedure, however, varies according to the importance of the right and the context, even as to fundamental decisions. If the right being waived is routine -- as in the case of failure to make an ordinary evidentiary objection, or the client's absence from a routine trial conference -- no special protections have been required. Mere silence is enough, especially where defendant is counseled. See, e.g., *United States v. Gagnon*, 470 U.S. 522, 527-28 (1985). In some cases the courts have relied solely upon counsel to inform a defendant of his or her legal rights, in this way ensuring that any waiver-by-silence is knowledgeable. See *United States v. Pennycooke*, 65 F.3d 9 (3d Cir. 1995) (surveying Court of Appeals case law governing defendant's decision whether to testify). For certain important Constitutional rights only an explicit affirmative waiver, after prescribed warnings, will be sufficient. *E.g.*, *Faretta v. California*, 422 U.S. 806, 835 (1975) (waiver of right to trial counsel); *Boykin v. Alabama*, 395 U.S. 238 (1969) (guilty plea); *Miranda v. Arizona*, 384 U.S. 436 (1966) (warnings required for suspect in custody to waive right to counsel and to remain silent); *Von Moltke v.*

Gillies, 332 U.S. 708, 724 (1948) (plurality opinion) (judge's responsibility to ensure knowing waiver of counsel).

The right to an appeal is waived by silence, but Rule 32(a)(2) dictates that it must be a warned silence. A defendant who fails to file a notice of appeal within 10 days of entry of judgment irretrievably loses his or her right to appeal. Fed. R. App. P. 4(b) (with irrelevant exceptions). That mere inaction, however, is not sufficient to waive the right to appeal *unless* it is preceded by the court's personal advice that the defendant has the right to appeal. The Rule imposes that minimum level of procedural protection because (a) the right to an appeal is not so routine or unimportant that the vagaries of waiver-by-silence are an acceptable trade-off for efficiency; and (b) that right cannot be entrusted solely to counsel, given the fragile state of the attorney-client relationship at the completion of the trial-court proceedings.[7]

C. Rule 32(a)(2) Embodies A Recognition That The Right To A Direct Appeal Is Too Fundamental To Be Waived By Mere Unwarned Inaction

That right to test one's conviction for legal error on direct appeal is a highly valuable right. Over thirty-five years ago, this Court observed that the right to appeal from a federal criminal conviction had become, "in effect, a matter of right." *Coppedge v. United States*, 369 U.S. 438, 440 (1962); *see also, e.g.*, 28 U.S.C. § 1291 (appeal from final

[7] Clearly, the Rule imposes at least this minimal level of protection. We do not propose to discuss the issue of whether the right to appeal is so fundamental that more elaborate warnings or a more explicit waiver should be required, an issue which was not raised below or in the *certiorari* petition.

order of district court); 18 U.S.C. § 3742 (appeal from erroneous criminal sentence). Over forty years ago, this Court observed that "[a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence." *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). Even the Eighth Circuit decision relied upon by the court below in this case acknowledged that the right to appeal a criminal conviction, while not guaranteed by the Constitution, "is unquestionably a substantial right." *United States v. Drummond*, 903 F.2d 1171, 1174 & n.8 (8th Cir. 1990) (citing *Coppedge, supra*), *cert. denied*, 498 U.S. 1049 (1991).

A direct appeal is the primary backstop against trial-court error. Indeed, this Court has relied upon the primacy of direct appeal in order to justify restricting Section 2255 and habeas relief to cases of fundamental error:

> Direct review is the principal avenue for challenging a conviction. 'When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. ...'

Brecht v. Abrahamson, 507 U.S. 619, 633 (1993) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). Indeed, this Court has held that the decision whether to take a criminal appeal is one of a handful of decisions deemed so "fundamental" that only the client, not the lawyer, may make it. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he

accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.").

To be sure, this Court has not recognized the right to a criminal appeal as being inherent in the concept of due process of law.[8] The Court has, however, consistently recognized the critical importance of at least one level of appellate review to ensure that convictions are legally and factually correct. Where an appeal as of right is provided for, it is tantamount to an implicit determination "that [the government] was unwilling to curtail drastically a defendant's liberty unless a second judicial decisionmaker, the appellate court, was convinced that the conviction was in accord with the law." Such a system really makes "the appeal the final step in the adjudication of guilt or innocence of the individual ...." *Evitts v. Lucey*, 469 U.S. 387, 403-04 (1985).

The right to appeal, if not Constitutional in origin, is protective of Constitutional rights, and is hedged about by Constitutional protections. Where the right to an appeal exists, it must be administered in keeping with the Due Process Clause. *Evitts v. Lucey*, 469 U.S. at 400-01. Where a state does provide for a first appeal as of right, the

[8] Over a hundred years ago, this Court stated that the right to take a criminal appeal is not inherent in the notion of due process in *McKane v. Durston*, 153 U.S. 684, 687 (1894), a holding that continues to be cited. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The cases before this Court have considered what restrictions or burdens may constitutionally be attached to a statutory right to appeal. E.g., *Ross v. Moffitt*, 417 U.S. 600, 605-08 (1974) (surveying line of cases dealing with right to counsel, filing fees, access to transcripts, etc., on criminal appeal).

Fourteenth Amendment guarantees a criminal defendant the right to counsel. *Douglas v. California*, 372 U.S. 353 (1963); see also *Evitts v. Lucey*, 469 U.S. at 393. Moreover, criminal defendants have a due process right not just to counsel, but to the effective assistance of counsel, on direct appeal. *Evitts v. Lucey, supra*. Because of the procedural and liberty interests at stake, this Court has not hesitated to strike down as unconstitutional even fairly minor burdens upon the statutory right to appeal.[9]

The right to a direct appeal, then, is so crucial to the preservation of other rights, that it occupies an exalted and perhaps unique status in the criminal justice system. Moreover, a defendant cannot waive the right of appeal itself without waiving the Constitutional protections that surround it. Because the loss of this right by definition cannot be remedied on direct appeal, unfettered access to another remedy is required, as discussed further below. The place of an appeal in our criminal justice system is one important guide to understanding the nature, purpose and scope of Rule 32(a)(2) as it relates to a potential waiver of appellate rights.

D. Rule 32(a)(2) Embodies A Recognition That The Advice Of The Right To Appeal Must Come

[9] See *Evitts v. Lucey*, 469 U.S. at 393 (collecting cases); *Ross v. Moffitt*, 417 U.S. at 605-08 (synthesizing earlier case law, and finding no right to counsel for discretionary, second or subsequent level of appeal); *Draper v. Washington*, 372 U.S. 487 (1963) (availability of free transcript to indigent defendant seeking an appeal cannot be conditioned on trial court's finding of nonfrivolousness); *Burns v. Ohio*, 360 U.S. 252 (1959) (striking down $20 filing fee for indigents to move for leave to appeal from intermediate appellate court's affirmance of criminal conviction); *Griffin v. Illinois*, 351 U.S. 12 (1956) (striking down requirement that appellant obtain transcript, where no provision made for indigent defendants).

From The Court, As Reliance Upon Counsel's Advice Cannot Ensure That Defendant's Silence Actually Constitutes An Informed Waiver Of The Right To Appeal

A district court might comfort itself with the knowledge that competent counsel will ensure that defendant's private, off-the-record waiver is an informed one. "Upon this point a page of history is worth a volume of logic."[10] The failure of this approach is the very reason for the enactment of Rule 32(a)(2). It is not that defense counsel cannot be trusted; far from it. Rather, experience has shown that the very brief period for appeal can easily slip by unnoticed in the ten days following the entry of judgment, a period in which the attorney-client relationship is often in flux. In addition, the amendment to the Rule makes it clear that the attorney cannot act as a surrogate for the court in this context.

Rule 32(a)(2) replaced old Rule 37(a)(2), which required the court to advise only unrepresented defendants of their right to appeal.[11] See Fed. R. Crim. P. 32, Advisory Committee Notes, 1966 amendment. As the Advisory Committee explained it, the scope of the Rule was expanded to include represented defendants for a number of reasons. The underlying concern was that, at this stage of the proceedings, the attorney-client relationship may be breaking

[10] *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

[11] Former Rule 37(a)(2) stated:

> "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal, and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

down, and silence therefore may not be a reliable indicator of defendants' intent to waive an appeal:

> [S]ituations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e.g., *Hodges v. United States*, 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis.

Advisory Committee Notes, *supra*.[12]

As the Advisory Committee implies, the period immediately following sentencing is often a fragile point in the attorney-client relationship. Some attorneys may be unwilling, or feel themselves unqualified, to handle an appeal. Court-appointed counsel are too often confused or unaware that their duties include the filing of a timely notice of appeal absent an intelligent waiver by the client. In the

[12] Under current law, defendants are more likely to be remanded directly after sentencing than in 1966, when the Advisory Committee wrote. *Compare* 18 U.S.C. § 3143 (b) (current ver.) with 18 U.S.C. § 3148 (1982).

case of retained counsel, the retainer may have been exhausted long ago, and counsel may be reluctant to file a notice of appeal that may carry with it the obligation to see the appeal through. Some convicted and sentenced clients may be -- perhaps unjustifiably, but nevertheless understandably -- dissatisfied with their attorneys' services, even to the point of anger or blame. For all these reasons, the client may not feel certain whether the lawyer still is or should be his or her lawyer.

This Court, in *Rodriquez v. United States*, 395 U.S. 327 (1969), noted the twilight zone of representation that follows sentencing. There, the trial judge failed to advise a represented defendant of the right to appeal. Counsel moved to obtain leave for the client to proceed *in forma pauperis*, indicating that "petitioner would be unrepresented in the future." 395 U.S. at 331. Meanwhile the defendant's right to appeal simply fell in the cracks, seemingly a victim of the unsettled status of defense counsel. See *ibid.*

The *Rodriquez* Court expressed the confident conviction that the intervening 1966 amendment to the rules would settle this issue once and for all: "The problem of determining whether to give notice to a person represented at trial, but who may not be represented on appeal, will therefore not recur." *Id.* at 331 n.3; see also *Dillane v. United States*, 350 F.2d 732, 733 (D.C. Cir. 1965) (this problem is "in the process of becoming academic"); *cf. Boruff v. United States*, 310 F.2d 918, 921 (5th Cir. 1962) (advice of court required because ten-day period to appeal "would be an unrealistically short time, for a person who was not guided during every moment of the ten days by the advice of counsel").

For all these reasons, the 1966 revision constituted a recognition that, while an unwarned waiver might ideally work as the old rule intended, often it did not. What was needed was a bright-line rule, applicable to everyone.

The optimistic view of Rule 32(a)(2) is valid only to the extent that the Rule is enforced rigorously and literally. Under the post-1966 rule, every defendant must be told by the court of the right to appeal. We do not suggest that this is a panacea or an ironclad guarantee of a knowing waiver. But ten days of inaction, following such advice, is no longer so insolubly ambiguous, when the court's advice provides at least a minimum prerequisite for interpreting the silence as a waiver.

This advice, as the Rule implicitly recognizes, must come from the district court itself, not from counsel. Coming from a neutral judge, it carries the weight of authority and impartiality. Coming from the decisionmaker whose rulings would be challenged, it removes any question of intimidation or fear of reprisal from the mind of an unsophisticated defendant. Coming from the court, it constitutes a guarantee of fairness, not tactical advice.

This advice from the court also sweeps aside any representation issues between client and lawyer, and disposes of any practical difficulties in filing a notice of appeal. It sweeps aside representation issues because the court delivers the advice directly to the defendant. It disposes of practical difficulties because the defendant need only say the word, and the clerk will "prepare and file forthwith" a notice of appeal on defendant's behalf.[13] Fed. R. Crim. P. 32(a)(2).

[13] By taking advantage of this opportunity, the defendant can ensure that the appeal is filed on time, without preliminary haggling over continued

Perhaps most crucially, the court's advice that an indigent defendant may proceed *in forma pauperis* removes any perceived financial disincentive to filing a notice of appeal. Defendants learn directly from the court that their attorney's reluctance or desire to secure a fee does not stand between them and their appellate rights.

Finally, a mandatory and inflexible Rule helps ensure that trial and sentencing errors will be uncovered and corrected. The Rule makes the advice of the right to appeal public and nondiscretionary. The natural human temptation to bury one's mistakes is taken out of the equation.

Rodriquez v. United States, supra, supports the position that the procedural opportunity afforded by the Rule is valuable in and of itself, suggesting a narrow scope for harmless error analysis. In that case, the government conceded that the district court erred in dismissing defendant's Section 2255 motion on the ground that he had failed to allege "prejudice," in the sense of a meritorious issue that he would have pressed on appeal. This Court agreed. 395 U.S. at 330. The government sought a remand so that the district court could take evidence as to why counsel did not file an appeal. This Court, relying for the most part upon the district court's violation of old Rule 37(a)(2), rejected the need for further fact finding. In the Court's view, the district court's error had deprived defendant of his right to appeal, and "[s]ince this deprivation appears on the record before us, we see no need for any

representation, an additional retainer, and so on. All of these attorney-client issues only underscore the wisdom of not permitting the court to delegate to counsel the Rule 32(a)(2) duty, as has been the practice in some courtrooms.

factual determinations on remand." *Id.* at 331. *Rodriquez* suggests that harmless error must be narrowly defined where the error applies to procedures that guarantee access to the judicial process.

In short, the court's violation of this Rule does not just deprive the defendant of a tidbit of procedural knowledge, which may be supplied by another. It burdens the right of appeal, and makes it less likely that defendants will appeal. Taken together, all of these aspects of the amended Rule add up to a recognition that, at this stage of the proceedings, the attorney's advice is inherently not an adequate substitute for the court's advice.

Fairly minimal burdens on the right to appeal, such as a $20 filing fee or a preliminary determination of merit, have led this Court to strike down state statutes as unconstitutional.[14] Surely the burden on the right of appeal resulting from a Rule 32(a)(2) violation will support a decision simply to enforce the Rule as written.

F. The "Harmless Error" Approach Undermines The Very Purpose Of The Rule, Which Is To Impose A Nondiscretionary Duty On The Court And Eliminate Case-By-Case Evaluation

Rule 32(a)(2) was adopted as a "bright line" rule, because old Rule 37(a)(2) led to "persistent litigation over whether the defendant had been fully informed of his rights by his counsel." *United States v. Drummond*, 903 F.2d 1171, 1175 (8th Cir. 1990) (Heaney, J., dissenting). The overwhelming majority of Circuits, which have adopted the

[14] See p. 13 & n.9, *supra*.

per se error approach, have held that the mandatory character of Rule 32(a)(2) effectively overrides the harmless error doctrine of Rule 52(a):

> The requirement of explicit notice of the right to appeal one's sentence is 'designed to insure that a convicted defendant be advised precisely of his right to appeal and to avoid a situation where the Government claims a defendant is otherwise aware of his right to appeal while the defendant denies such knowledge.' [quoting *Paige v. United States*, 443 F.2d 781, 782 (4th Cir. 1971)].... We hold that even in cases, such as this one, where the record is clear that Appellant became aware of his right to appeal through other sources, the sentencing court's failure to give notice of this right constitutes error per se. Like the majority of our sister circuits, we are persuaded that 'the policy of preventing excessive litigation justifies a strict and literal enforcement of Rule 32(a)(2).' [quoting *Reid v. United States*, 69 F.3d 688, 690 (2d Cir. 1995)]....

Thompson v. United States, 111 F.3d 109, 111 (11th Cir. 1997). Rule 32(a)(2) embodies a policy choice that the risk of adverse fact-finding will not be allocated to the defendant in so basic a matter as access to an appeal.

Put another way, a hearing cannot remedy the violation of a rule, where the purpose of the rule is to eliminate a hearing. The Circuits in the majority have rejected the remedy of holding a hearing "just-this-once" in

order to patch over a Rule 32(a)(2) violation, in favor of a bright-line compliance approach.

Underlying such holdings is the notion that Rule 32(a)(2) is a simple, workable rule of general applicability. Its predictability and certainty would, however, be greatly undermined by permitting case-by-case litigation.

As one court put it, hearings (like the one below in this case) "will often turn solely upon judgments as to the veracity of conflicting witnesses and the reliability of their memories ... such a proceeding is a poor substitute for initial compliance with the rule." *United States v. Benthien*, 434 F.2d 1031, 1032 (1st Cir. 1970). It is unavoidable that questions of historical fact in a criminal case will turn on such testimonial evidence. It is unacceptable, however, that so basic and fundamental a procedural guarantee as the right to appeal should hinge on credibility-based fact finding. In such a hearing, it hardly requires stating, a defendant has an obvious motive to state that the attorney failed to deliver the proper advice, and the attorney's professional pride and instinct for self-preservation may tend to push his or her testimony in the opposite direction.

That is no substitute for compliance with this simple Rule. But for the court's error, the defendant's right to appeal would appear on the face of the transcript. Where a court violates Rule 32(a)(2) the defendant's right to appeal is reduced from a matter of simple right to a question of credibility.[15]

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[15] The factfinder of course will be the very court whose error created the need for a hearing. This case illustrates the unavoidable pitfalls that defendants face in such a hearing. For example, one of the district court's three reasons for accepting the testimony of Peguero's attorney,

In addition, such a hearing is bound in many cases to invade attorney-client communications and drive a wedge between lawyer and client. This might be an acceptable cost in the context of, *e.g.*, an ineffective-assistance claim, where the defense is arguing that its own mistakes rendered a conviction unfair. Under the "harmless error" approach here, however, the defendant is placed in this quandary as a result of the *court's* error. The Circuits in the majority sensibly require that the court simply repair its error, instead of putting the burden on the defendant.

At any rate, the policy of Rule 32(a)(2) is that there is a better way, and it makes that better way mandatory.

G. The "Harmless Error" Approach, Which Balances The Costs Of Retrial Against The Seriousness Of The Error, Is Inappropriate Because The Issue At Stake Is Reinstatement Of An Unquestioned Procedural Right To File An Appeal

The rationale of the harmless error doctrine is a sound and practical one as far as it goes. Petitioner does not propose a wholly unworkable system in which each defendant is tried and retried until perfection is achieved. The specter of "automatic reversal" that the government

rather than that of Peguero, was its "experience with his trial counsel in previous matters. Counsel is an able lawyer, honest in his dealings with the court in the past ...." (Joint App. 181.) We have no reason to doubt that that is the case. Nevertheless, this is hardly a level playing field for a criminal defendant. And it is by virtue of the court's error -- not the error of defendant or his counsel -- that defendant is placed in this unequal position.

purported to raise in opposition to the petition for certiorari is a straw man. (Brief of United States, p. 8.)[16] The only "reversal" requested here is correction -- upon motion, in district court -- of the district court's erroneous failure to conduct sentencing in accordance with Rule 32(a)(2) The remedy is resentencing in order to reinstate the defendant's right to appeal.[17] At that point a defendant may file an appeal, in which his conviction or sentence may be affirmed or reversed. Such a resentencing is worlds apart from "reversal" in the usual sense (much less "automatic reversal"), and does not entail the same costs.

Where a convicted defendant on appeal asserts an error at trial, the appellate court's harmless error analysis necessarily incorporates a weighing of the seriousness of the error and the costs of reversal. As this Court has stated, the harmless error doctrine is necessary because "the reversal of a conviction entails substantial social costs," including duplication of effort, psychological stress, decreased accuracy because of the unavailability of evidence or the erosion of memory, the increased probability of unwarranted acquittals, and delay in the administration of criminal justice. *United States v. Mechanik*, 475 U.S. at 72. Where the error does not affect the fairness of the result, those costs are not justified. *Ibid.*

[16] The phrase seemingly derives from *United States v. Mechanik*, 475 U.S. 66, 71 (1986), in which the appellant sought dismissal of the indictment and reversal of his subsequent conviction.

[17] This remedy, taken from *Rodriquez* and the majority of Court of Appeals cases, eliminates the issue of appellate jurisdiction. It results in the entry of a new judgment, which restarts the clock and permits the Court of Appeals to take jurisdiction under Fed. R. App. P.4(b)

Such an analysis is far less relevant to a Rule 32(a)(2) error, however. Rule 32(a)(2) is not a rule of decision or a procedure bearing on the fairness of the fact-finding process at trial. Nor, under *Rodriquez*, can the impact of the error be measured with reference to the likelihood of success on appeal. This Rule is a mandatory procedural requirement, to help ensure unfettered access to the judicial appeals process itself.

Strict enforcement of Rule 32(a)(2) does not ordinarily or necessarily entail such social costs as reversal of a conviction, retrial, any major duplication of effort or expenditure, or even the lowering of defendant's sentence. Defendant asks only that the court go through the formal step of conducting the sentence in accordance with Rule 32(a)(2). And all that defendant necessarily "gains" as a result is the right to file a notice of appeal as of right.

That appeal will test -- for the first time -- the legality of his conviction, based on an application of the law to the record. There is no question of fading memories or the like. In that appeal, the harmless error doctrine will of course apply to defendant's claims of error, to the same extent as if he had filed a notice of appeal immediately upon conviction. Defendant asks only, in effect, to be reinserted into the procedural context at the point where it went off track.

Thus the harmless error standard really has little application where the question is whether petitioner ever received proper access to the appellate procedure itself, and where the Rule itself is intended to supplant any such case-by-case inquiry.

As discussed in petitioner's brief, similar reasoning applies to the Third Circuit's alternative rationale, based on the high threshold for Section 2255 relief as expressed in *United States v. Timmreck*, 441 U.S. 780 (1979). The "miscarriage of justice" standard for collateral relief presupposes that the defendant has either filed an appeal, or waived his right to do so. As the Second Circuit, distinguishing the Section 2255 cases, put it,

> [W]here a defendant who pleaded guilty was not advised of his right to appeal his sentence in violation of Rule 32(a)(2), his failure to appeal did not bar a motion under § 2255 attacking the sentence; indeed, we ruled the court should vacate the sentence and remand for resentencing. ... [citing *Reid v. United States*, 69 F.3d 688, 690 (2d Cir. 1995)] This procedure assures a defendant 'the opportunity to raise on direct review sentencing claims that might not have been available on collateral attack,' *United States v. Bygrave*, 97 F.3d 708, 710 (2d Cir. 1996), and puts him in the position he would have occupied absent the district court's error.

Valente v. United States, 111 F.3d 290, 292 (2d Cir. 1997)

Amicus curiae NACDL respectfully submits that this Court should not upset the established practice. Like the overwhelming majority of lower courts, it should construe Rule 32(a)(2) straightforwardly and enforce it literally. This bright-line approach best fits the meaning and purpose of the

Rule, and best ensures that appeals from criminal convictions are waived knowingly.

CONCLUSION

For the reasons stated above and in petitioner's brief, the judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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